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In The

Supreme Court of the United States

October Term, 1995

EDWARD MURRAY, in his official capacity as Director of the Virginia Department of Corrections (VDOC); JOHN DOE, 1 - 7, in their official capacities such fictitious names being designated to identify those VDOC employees whose true identities are now unknown to plaintiff-intervenor, but who serve as (a) members of the VDOC Publication Review Committee, (b) Warden or Superintendent of Keen Mountain Correctional Center (KMCC), and (c) functional KMCC mailroom censor,

Petitioners,

v.

MONTCALM PUBLISHING CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a commercial publisher of graphic sexual material has a legitimate expectation, protected by the First Amendment, of distributing a publication containing explicit descriptions or pictures of sexual intercourse to state prisoners, such that the Due Process Clause of the Fourteenth Amendment requires the State to provide: (1) personal notice to the publisher whenever such a publication has been denied for receipt into the State's prisons; and (2) an individualized opportunity to challenge the decision?

2. Whether Montcalm Publishing Corporation had continued standing to pursue its facial challenge to the lack of a notice provision in Virginia's prison regulation governing incoming publications, once it had been determined that *Gallery* magazine consistently contains graphic sexual material that violates prison regulations, and the prison regulations are constitutional?

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JURISDICTION

The Fourth Circuit decision was reached on April 2, 1996; the Petition for Rehearing with Suggestion for Rehearing *En Banc* was denied on April 30, 1996. This Court has jurisdiction of this appeal under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or the press. . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Two Virginia Department of Corrections ("VDOC") inmates commenced this 42 U.S.C. § 1983 proceeding *pro se* by filing separate actions challenging the denial of multiple issues of *Gallery* magazine, a publication that consistently contains graphic descriptions of sexual intercourse. Jurisdiction was predicated upon 28 U.S.C. § 1331. The district court denied summary judgment and referred the matter to a magistrate judge for an evidentiary hearing. After the cases had been consolidated for trial, the Respondent herein, Montcalm Publishing Corporation ("Montcalm"), intervened and filed its own Complaint.

Montcalm's Complaint echoed the inmates' challenge to the prison officials' repeated decisions to disallow *Gallery* for receipt into Virginia's prisons. Touting *Gallery*'s literary content, Montcalm contested the facial validity of the VDOC regulation governing inmate receipt of publications because the regulation failed to incorporate

all prongs of the *Miller v. California*, 413 U.S. 15 (1973), test for obscenity. Montcalm also challenged the constitutionality of the particularized decisions to disallow various issues of *Gallery* into Virginia's prisons, because, allegedly, inconsistent decisions had been reached under the regulation with respect to *Gallery* and other sexually explicit publications. These legal questions have been decided adversely to the inmates and Montcalm, and are no longer a part of this case.

The only issue Montcalm raised that has survived the proceedings below is a challenge to the facial validity of a prison regulation governing receipt of publications where the regulation does not provide for notice to the publisher of a magazine disallowed for receipt, as well as an administrative opportunity for the publisher to challenge such decisions. The magistrate judge, having completely validated the VDOC's decision to prohibit for inmate receipt approximately 15 consecutive monthly issues of *Gallery*, nonetheless recommended that the district court require the VDOC to notify publishers of magazines disapproved for receipt within Virginia's prisons, and to further require the VDOC to afford the publisher an opportunity to contest the decision.

The inmates and the defendants objected to the magistrate judge's report and recommendation. Montcalm did not. The district court agreed with the magistrate judge in all respects, except as to notice and opportunity to respond. The court readily recognized that a magazine publisher does not occupy the same position as does the sender of a personal letter. Accordingly, the court found the individualized notice requirement of *Procunier v. Martinez*, 416 U.S. 396, 417-18 (1974), *overruled on other*

grounds by Thornburgh v. Abbott, 490 U.S. 401 (1989), inapposite. Believing itself bound by language in *Abbott*, 490 U.S. at 408, that seems to recognize a First Amendment interest of publishers in communicating with willing inmate subscribers, the trial court analyzed what process is due a publisher when a magazine is not allowed inside a state prison. The court balanced the limited First Amendment interest it found the publisher had with the unique interest the state has in running its prisons, and found that the notice already provided the affected inmate was adequate to protect the publisher's interest as well. In reaching that decision, the court employed the three-part test for due process established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and found that the VDOC regulation did not pose an undue risk of depriving Montcalm or other publishers of any First Amendment interest. Any additional procedures, the court determined, would not provide a necessary safeguard missing from the regulation, but rather would be duplicative of safeguards already available through notice to the inmate. The court concluded its analysis by finding that the VDOC would incur substantial financial and administrative burdens if it were required to provide publishers individualized notice and an opportunity to respond.

Only Montcalm appealed, challenging the district court's decision with respect to a notice requirement. The Fourth Circuit, characterizing the issue solely as a legal one, reversed and remanded with instructions to the district court to determine appropriate process for publishers. Recognizing the 20 year old decision in *Cofone v. Manson*, 409 F. Supp. 1033 (D. Conn. 1976), as the only

case ever to find a constitutional requirement of publisher notice, the court of appeals declined to follow this Court's decision in *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 130-31 (1977), characterizing this Court's First Amendment rule in *Jones* with respect to prison bulk mailings as "barely implicated" in this case. Instead, the court decided, a publisher of a magazine, including one containing obscene descriptions of sex acts which has been properly disallowed for receipt into prison, stands on a footing essentially equal to a sender of a personal letter. Without discussing this Court's *Mathews v. Eldridge*, 424 U.S. 319 (1976), due process analysis upon which the district court had relied, the court of appeals found that Montcalm had a constitutional entitlement to individualized notice and an opportunity to respond.

The VDOC, through its Director, requests this Court to grant certiorari to reverse the decision of the court of appeals.

REASONS FOR GRANTING THE WRIT

This Court should grant review of the judgment of the court of appeals because this case presents questions of substantial importance for prison administration throughout the country. *Sup. Ct. R.* 10.1(c); *Rhodes v. Chapman*, 452 U.S. 337, 344 (1981) ("We granted the petition for certiorari because of the importance of the question to prison administration."); *accord Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 459 (1989); *Wolff v. McDonnell*, 418 U.S. 539, 542 (1974). The decision of the court of

appeals conflicts with prior opinions of this Court mandating substantial judicial deference to state prison administrators, and holding that First Amendment rights are properly limited in the prison setting. *Sup. Ct. R.* 10.1(c). The decision of the court of appeals also departs from the accepted and usual course of judicial proceedings, in that it reaches to decide a federal question when there was no longer a live case or controversy. *Sup. Ct. R.* 10.1(a).

I. A COMMERCIAL PUBLISHER OF GRAPHIC PORNOGRAPHY HAS NO INTEREST PROTECTED BY THE FIRST AMENDMENT IN SELLING AND DISTRIBUTING ITS PRODUCT TO STATE PRISONERS, SUCH THAT DUE PROCESS REQUIRES THE STATE TO PROVIDE INDIVIDUAL NOTICE AND AN OPPORTUNITY TO RESPOND WHEN ITS PUBLICATION IS WITHHELD FROM AN INMATE SUBSCRIBER

The failure of the court of appeals to consider the graphic sexual character of *Gallery* magazine when it formulated a constitutional right to publisher notice should cause this Court to accept review of this case to correct the error of the court below. Virginia and those other states compelled to follow this decision now find themselves bound, as a matter of constitutional law, to incur substantial additional financial and administrative burdens to provide commercial purveyors of hard core pornography notice and opportunity to respond when they have no legitimate constitutional expectation that their product will be admitted within prison walls. The effect of the court of appeals' decision is certain to spread

to other circuits, needlessly inviting federal judicial entanglement in a heretofore unrecognized constitutional arena. The court of appeals committed undoubted error, and its judgment should be reversed.

A. Publisher First Amendment Interests Are Severely Restricted In The Prison Setting

This Court has never expressly held that publishers wishing to communicate with state prisoners have a First Amendment right to do so. Those few decisions suggesting that publishers have a First Amendment right in the prison setting have assumed the right to exist. To the extent that this Court's precedent recognizes such a First Amendment right to communicate with state prisoners, the right is properly viewed as a *de minimis* interest which must bow to legitimate penological concerns.

In *Procunier v. Martinez*, 416 U.S. 396 (1974), the first significant case discussing First Amendment rights in the prison context, this Court held that the author of a personal letter written to an inmate has some First Amendment right to communicate to the inmate, and is therefore entitled to notice if his letter is rejected for receipt into the prison. 416 U.S. at 417-19. The *Martinez* court expressly reserved judgment as to whether mass mailings were entitled to the same constitutional protection as individual correspondence, 416 U.S. at 408, n. 11, and did not opine at all as to whether publishers of graphic sexual material had any First Amendment interest in peddling their wares to inmates.

In the companion cases of *Pell v. Procunier*, 417 U.S. 817 (1974), and *Saxbe v. Washington Post Co.*, 417 U.S. 843

(1974), this Court upheld California and federal prison regulations which prohibited face-to-face interviews between prisoners and members of the news media. *Pell v. Procunier* discussed the rights of the inmates. *Saxbe* solely involved the rights of the media, as only the newspaper and reporter brought suit challenging the prison regulations. Both cases articulated the principle that the media has no special right of access to prisoners beyond that afforded to the general public. *Pell*, 417 U.S. at 834; *Saxbe*, 417 U.S. at 849. This principle was affirmed a few years later in *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (plurality).

This Court revisited the issue of mass mailings in the prison context that was reserved in *Procunier v. Martinez*, and determined that First Amendment rights to free speech are "barely implicated" where bulk mailings are restricted from a prison. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 130-31 (1977). The *Jones* decision upheld prison regulations prohibiting the delivery of packets of Union publications which had been sent in bulk to several inmates for redistribution among other inmates. 433 U.S. at 121. This Court found any First Amendment burden on the Union to be essentially *de minimis* and justified by legitimate penological concerns. 433 U.S. at 130-31.[1]

The decision in *Bell v. Wolfish*, 441 U.S. 520 (1979), upheld a federal prison regulation restricting inmates' receipt of hardback books unless mailed directly from the

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[1] This Court further found that state prisons are not "public forums" entitled to any special First Amendment considerations. 433 U.S. at 134.

publisher, book club, or book store, and in *Block v. Rutherford*, 468 U.S. 576 (1984), this Court upheld a prison regulation banning contact visitation. Both cases mandated deference to the expertise of prison administrators, finding these regulations to be rational responses to the concerns of the experts. *Bell v. Wolfish*, 441 U.S. at 551; *Block v. Rutherford*, 468 U.S. at 586.

Turner v. Safley, 482 U.S. 78 (1987), upheld prison regulations which effectively prohibited prison inmates from corresponding with one another, unless they were family members. In so doing, this Court recited the authority discussed above and stated:

> If *Pell*, *Jones*, and *Bell* have not already resolved the question posed in *Martinez*, we resolve it now: when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.

Turner v. Safley, 482 U.S. at 89. The federal courts should look at several factors to make this determination. The prison regulation should be objective and neutral, in that there must be a valid and rational connection between the regulation and the interest being asserted by the government. The courts should examine whether there are alternative means of exercising the constitutional right being asserted, and the impact any accommodation of the asserted right would have on the prison. Finally, the courts should examine whether there are "ready alternatives" and whether the prison's response is "exaggerated" to determine the reasonableness of the regulation. 482 U.S. at 89-91. A more deferential standard is necessary in the prison setting, as "prison administrators

. . . , and not the courts, [are] to make the difficult judgments concerning institutional operations." 482 U.S. at 89, *citing Jones v. North Carolina Prisoners' Union, Inc.*, 433 U.S. at 128.

This Court subsequently upheld federal prison regulations which banned publications upon the warden's finding that the publication was "detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." *Thornburgh v. Abbott*, 490 U.S. 401, 404 (1989). This Court yet again affirmed the principle that, while prison walls do not automatically extinguish the First Amendment rights of prisoners or persons seeking to communicate with prisoners,

> we have been sensitive to the delicate balance that prison administrators must strike between the order and security of the internal prison environment and the legitimate demands of those on the "outside" who seek to enter that environment, in person or through the written word. Many categories of noninmates seek access to prisons . . . yet prison officials may well conclude that certain proposed interactions, though seemingly innocuous to laymen, have potentially significant implications for the order and security of the prison. Acknowledging the expertise of these officials and that the judiciary is "ill equipped" to deal with the delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world.

Abbott, 490 U.S. at 407-08 (citations omitted). The *Abbott* decision adopts the deferential *Turner v. Safley* test as

applicable, even though noninmates were affected by the regulation. This Court expressly rejected the *Martinez* test, which had required a "tighter fit" between the challenged regulation and the government interest asserted. *Abbott* overruled *Martinez* to the extent it suggested a less deferential test would apply to incoming publications. To the extent *Martinez* survives at all, it applies only to personal correspondence from prisoners to persons outside the prison. 490 U.S. at 413-14.

Abbott assumed that publishers generally had a First Amendment right to communicate with inmates who were "willing recipients" of their publications, 490 U.S. at 408, but did not discuss the scope of this First Amendment interest. The court of appeals in this case has effectively equated the interest of publishers of magazines with that of the senders of personal correspondence, suggesting that the due process protections for both are the same. The VDOC urges this Court to grant review of this case and determine that First Amendment rights of publishers to communicate with prisoners are *de minimis*, *see Jones*, 433 U.S. at 130-31, and thus procedural due process is barely implicated, and certainly does not mandate individualized notice to the publisher and a right to be heard.

B. A Publisher Of Graphic Pornography Cannot Have An Expectation Of Constitutional Protection To Disseminate Its Obscene Materials Inside A Prison

Montcalm has never suggested that *Gallery*, or any particular issue of *Gallery*, does not violate the VDOC regulation on obscenity. Montcalm instead repeatedly

urged the court below to rule that DOP 852 was not facially constitutional because it did not precisely track the *Miller v. California*, 413 U.S. 15, 24 (1973), definition of obscenity, a requirement allegedly compelled by the regulation's reference to "obscenity criteria." Under *Miller*, an utterance or expression is not protected by the First Amendment where a normal person applying contemporary community standards would find that the work, taken as a whole, appeals to a prurient interest in sex; the work depicts or describes sexual conduct in a patently offensive way; and the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. at 24. The trial court correctly rejected Montcalm's argument on this issue, noting that the VDOC was not required to follow the *Miller v. California* definition, and that the proper constitutional test for a prison regulation limiting receipt of publications had been articulated in *Abbott*.

The VDOC cannot be required to follow the *Miller v. California* standard, because prison officials need not evaluate the publication "taken as a whole" to determine whether it has value despite the sexually explicit content. *Compare Abbott*, 490 U.S. at 407-12, 418-19; *Miller v. California*, 413 U.S. at 24. It cannot be and has not been disputed, however, that the VDOC regulation at issue in this case tracks the *Miller v. California* test for obscenity, except that the VDOC is not required to evaluate the publication "taken as a whole" under community standards. *Id.*

The explicit sexual nature of the letters contained in the "Feedback" section of every issue of *Gallery* prompted the VDOC to conclude that *Gallery* violated its obscenity

criteria for publication disapproval. App. 35a; *see* App. 74a (VDOC Division Operating Procedure ("DOP") 852.VIII.D). These letters are, without question, devoid of any ideas that have an entitlement to constitutional protection. The district court conclusively determined that the "Feedback" section of *Gallery* graphically and offensively depicts sexual activity and sexual intercourse, and "a reasonable person viewing the material as a whole would ostensibly conclude that it appeals to a prurient interest in sex." App. 52a. The letters themselves are clearly obscene and, viewed apart from the rest of the magazine, would be entitled to no First Amendment protection in free society. *See Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).[2]

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[2] With our apologies to the Court, we believe a brief excerpt from just one of the "Feedback" letters conclusively demonstrates the obscene nature of the material that is each and every month interspersed throughout *Gallery* magazine.

> Darting my tongue out, I licked the soft inner flesh of my wife's pussy. Carol reached down to spread her lips to give me access. Exquisite pleasure flowed through me as Sandy's mouth encompassed my spent prick. The more she sucked and licked my cock, the more active my tongue became on the clit I was teasing.
>
> After I licked my wife to orgasm, she moved off my face to kneel on the bed so I could fuck her doggie style. At first, Sandy watched us, but it got too much for her to take. Moving between my legs, with her head beneath my crotch, she rose so she could lick my balls as my hard cock thrust into Carol's wet cunt-tunnel. On each backward motion of my thick shaft, her tongue would lave the juices my cock had pulled out of my wife's juicy slit.

This Court has repeatedly determined, where the audience is comprised of prisoners, that the scope of the First Amendment right at issue is narrow. *See Thornburgh v. Abbott*, 490 U.S. 401, 407-12 (1989); *Bell v. Wolfish*, 441 U.S. 520, 545-48 (1979); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129-33 (1977); *Pell v. Procunier*, 417 U.S. 817, 822-28 (1974); *Procunier v. Martinez*, 416 U.S. 396, 408-13 (1974). While this Court has never articulated a standard of obscenity for prisons, it has repeatedly articulated special considerations in First Amendment jurisprudence where children are in the

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Trial testimony conclusively proved the detrimental impact that prisoner possession of such material has upon security and rehabilitation efforts. App. 44a-45a. This type of material is used by inmates to harass female employees, is mailed by inmates to "unwilling recipients" on the outside, and is also used as valuable barter among inmates. Considerable staff time is diverted from security and administrative tasks to try and police the possession of this contraband, thereby increasing the already difficult job of running a safe and effective prison. The sex acts so vividly described as something the reader should also desire actually violate Virginia's criminal proscription of fornication, as well as anal and oral intercourse, further eroding the already low respect these felons have for the criminal law.

Perhaps most telling is the adverse impact of the material on efforts to rehabilitate the many sex offenders behind prison walls. These lurid fantasies perpetuate the myth that women want to be utilized sexually by men; it demeans the victims of the assaults by sexual predators through depiction of women as willing recipients of every sex act imaginable. *See also* App. 21a (referencing empirical studies in support of this conclusion). We would be remiss if we failed also to point out the testimony about the concern that possession of the material may increase the number of sexual assaults by prisoners against one another, as well as female staff.

audience. These cases are instructive on the issue as it applies to prisons.

In *Ginsberg v. New York*, 390 U.S. 629 (1968), this Court articulated the "variable obscenity" doctrine, finding a more flexible approach to the term "obscenity" appropriate where children are in the audience. *Ginsberg* affirmed a statute banning the sale of sexually oriented material to minors, even though the material (1) was not "obscene"; (2) was entitled to First Amendment protection with respect to adults; and (3) was available to adults. Subsequently, in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court held that the FCC has power to regulate a radio broadcast which is "indecent" but not "obscene," because children are reasonably presumed to be present in the early afternoon audience. This principle was most recently re-affirmed in *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 64 U.S.L.W. 4706 (June 28, 1996).

Criminal statutes prohibiting the distribution of materials depicting children engaged in sexual activity have been upheld, even though the activity depicted may not satisfy the *Miller v. California* obscenity test. *New York v. Ferber*, 458 U.S. 747 (1982). Such depictions of children engaged in sex acts are not protected by the First Amendment; the *Miller v. California* test is inappropriate and needs to be adjusted for this context. In particular, *Ferber* rejected precisely those aspects of the *Miller v. California* test which the VDOC declined to incorporate into its regulation: the inquiry whether the sexual conduct was portrayed in a patently offensive manner, and the requirement to review the material "taken as a whole."

458 U.S. at 764-65. The state's legitimate interest in protecting the physical and psychological welfare of minors has to be balanced against any *de minimis* interest in permitting this form of expression. While statutes prohibiting this type of expression may not be overbroad, *see Massachusetts v. Oakes*, 491 U.S. 576 (1989), the definition of obscenity is appropriately adjusted to meet the government's legitimate interests.

Similarly, in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), this Court held that a fourteen year old had no First Amendment protection that attached to "lewd," "indecent," and "offensive" speech directed at an audience of his student peers. The Court deferred to the schools to preserve the values of "a civilized social order," and found that the school could prohibit this speech without affronting the First Amendment, even though there was no finding that the speech was "obscene." 478 U.S. at 683, 685. This Court subsequently adopted a deferential standard of evaluating school regulation over the style and content of student speech in school-sponsored activities. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 272-73 (1988). In *Hazelwood*, this Court upheld the censorship of two articles written for the student newspaper, one article concerning teenage pregnancy, and another concerning divorce. 484 U.S. at 274-75. The standard articulated by this Court for the school setting is strikingly similar to the standard articulated in *Turner v. Safley* for the prison setting. Educators may regulate speech "so long as their actions are reasonably related to legitimate pedagogical concerns." 484 U.S. at 273. This standard was adopted in recognition of the

deference owed to state and local school officials by the federal courts. *Id.*

The court of appeals never addressed the VDOC's argument that *Gallery* magazine, by graphically depicting sexual acts of intercourse in every issue without exception, is legally obscene for purposes of receipt into Virginia state prisons. By ignoring this argument, the court could not properly address the procedural due process issue, as will be discussed further below. The VDOC urges this Court to grant review of this case, to determine that the definition of legal obscenity may be adjusted in the prison context, and to find that, where the material is obscene in a prison setting, due process requires nothing beyond the procedures the district court found the regulation already provides.

C. The Fundamental Error In Requiring Individualized Notice To Publishers Wrongly Interposes The Federal Judiciary Into The Operation Of State Prisons

It is "sentimental hallucination" to hold freedom of speech so sacrosanct that any publisher seeking access to a state prison as a forum for expressive activity could invoke the power of the federal court to cut himself a pass key to the state prison's gate, regardless of the content of his publication. It is an equal jurisprudential absurdity that a publisher may – by asserting a right to utter obscenity to Virginia's prisoners, and despite the fact that the federal courts have conclusively resolved that the publication is appropriately disallowed – compel prison administrators to provide it with notice and an

opportunity to be heard each and every time its obscene matter is disallowed for receipt. Yet this is the result of the lower court's decision.

Putting the obscene nature of *Gallery* magazine to one side, the requirement of individualized notice to ***any*** publisher wrongly increases the expense and burdens of prison administration, as the district court correctly found, and also creates a heretofore unrecognized basis for federal judicial supervision of state prisons. The lower court did virtually no analysis to conclude that individualized notice and an opportunity to be heard was necessary to adequately protect the limited First Amendment interests at stake. The notice and opportunity the VDOC already provides to the intended inmate recipient satisfies any due process protection a publisher might be owed.

The court of appeal's holding that magazine publishers have a First Amendment right protected by individualized notice and opportunity to respond represents a case of first impression in the federal circuits. The only other circuit court decision on the subject is dicta in an Eleventh Circuit case expressing "concern" that a Florida Department of Corrections review procedure did not "provide notice and opportunity to the sender [a publisher] to protest the exclusion, and the reasons for the exclusion." *Lawson v. Dugger*, 840 F.2d 781, 786-87 (11th Cir. 1987), *vacated*, 490 U.S. 1078 (1989), *on remand*, 897 F.2d 536 (11th Cir. 1990), *on remand*, 844 F. Supp. 1538 (S.D. Fla. 1994). The district court ultimately determined that Florida's revised review procedures were substantially similar to the Bureau of Prisons' regulations at issue in *Abbott*, and thus there was no reason to question the

necessity or the adequacy of the procedural protections. 844 F. Supp. at 1543-45.

The appeals court's decision recognizes the paucity of case law on the subject of whether a publisher seeking to communicate to prisoners has a First Amendment right protected by procedural due process, App. 9a, referencing two cases that admittedly had nothing whatever to do with publishers,[3] but instead plainly involved the *Martinez* set of facts. Ultimately, the only arguable case on point the court could cite was *Cofone v. Manson*, 409 F. Supp. 1033 (D. Conn. 1976). The trial court in *Cofone* applied the *Procunier v. Martinez* test to incoming publications in a prison setting, reasoning almost inconceivably that publications as a general rule present less of a threat to prison security and good order than does personal correspondence. 409 F. Supp. at 1039. *Cofone* goes even further than applying strict scrutiny to the censorship of incoming publications in prisons by suggesting that a "clear and present danger" test applies in this context, 409 F. Supp. at 1040, reasoning that was squarely and soundly rejected in *Abbott*, 490 U.S. 401. Rather, as this Court in *Abbott* held, incoming publications pose *more* of a security risk to prisons than does personal correspondence. 490 U.S. at 411-12, n. 10.

Although the absence of precedent does not mean that the lower courts have incorrectly found due process procedures generally applicable, a fundamental error was committed when the court identified individualized

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[3] *Martin v. Kelley*, 803 F.2d 236, 243-44 (6th Cir. 1986); *Trudeau v. Wyrick*, 713 F.2d 1360 (8th Cir. 1983).

notice as the mandated process. The court of appeals failed to recognize the circumscribed nature of any First Amendment interest asserted by Montcalm, and failed to recognize the purposes of the process to be provided.

Where the government seeks to restrain speech in free society, procedural due process requires no more than a prompt procedure to determine whether the speech may be limited in conformity with First Amendment principles. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Blount v. Rizzi*, 400 U.S. 410 (1971). For example, in *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court held that if a filmmaker is subjected to a licensing system to determine whether his film is obscene in free society, he is entitled to a prompt and fair procedure to determine the obscenity. The rationale for providing procedural due process, within or without prison walls, is simply to prevent arbitrary and capricious governmental denial of an important interest. *Procunier v. Martinez*, 416 U.S. at 418. The VDOC regulation already does that.

Where fundamental due process rights are implicated, three factors are balanced to determine the amount and nature of procedural safeguards required, articulated by this Court as follows:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional

> or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

As has been discussed above, to the extent that Montcalm has *any* First Amendment interest in sending *Gallery* magazine to Virginia inmates, it is undeniable that this interest is severely limited by the nature of the prison setting. The district court conclusively determined that the VDOC has numerous legitimate penal reasons to keep magazines such as *Gallery* out of Virginia's prisons, *see* note 2 *supra*, and that the VDOC regulation at issue is rationally related to these stated reasons. Furthermore, the district court has conclusively found that the VDOC has lawfully and properly applied its prison regulation to *Gallery* magazine based upon the obscene "Feedback" section of the magazine. These conclusions are unassailable, and in any event were not appealed by Montcalm.

Montcalm relies heavily, as it must, on the language of *Abbott* suggesting that publishers have some First Amendment interest in communicating their materials to prisoners. The language upon which Montcalm relies, however, squarely suggests that the publisher's interest is limited to communication with those inmates who wish to receive the communication. 490 U.S. at 408. As the district court properly recognized, the publisher's right to communicate with an inmate can be no greater than the inmate's right to receive that communication. If the inmate, however, is so uninterested in *Gallery* that he chooses not to challenge its disapproval, Montcalm can scarcely be heard to claim that it has been denied communication with a "willing recipient." Conversely, if the

inmate chooses to contest the denial, both he and Montcalm will have received a further review, at the inmate's behest, by a party other than the person who initially found the magazine improper under the regulatory criteria.

With regard to the second factor of the *Mathews v. Eldridge* analysis, Montcalm cannot show that notice and an opportunity to be heard will protect its rights any better than the current procedure. 424 U.S. at 335. In the first instance, the regulation provides for automatic review by the VDOC's Publications Review Committee ("PRC") whenever a decision is made at the institutional level not to allow a magazine for inmate possession. DOP 852.VIII.C.1; App. 73a. Additionally, the inmate can utilize the inmate grievance procedure to appeal both the initial institutional decision, as well as any subsequent action of the PRC confirming that determination. DOP 852.VII.D.1-2; App. 71a. The regulation thus already provides at least four layers of administrative review, including one automatic layer of review that does not even depend upon the inmate's request. The purpose of a further review is not to entertain arguments as to why the publication should be allowed, but simply to make sure that, under the regulatory definition, there has not been a mistake. That is all that due process could possibly require where First Amendment rights are so limited, especially where the regulation has been determined to be constitutionally valid.

The VDOC has a significant administrative interest in limiting the burdens which would result from providing magazine publishers with notice and an opportunity to be heard. The VDOC reviews magazines issue by issue,

and there is significant evidence on the record regarding the sheer volume of magazines which are reviewed at VDOC institutions. Additionally, the regulation already affords multiple layers of review. As the district court correctly found, providing Montcalm with notice and an opportunity to be heard every time its magazine is disallowed would increase administrative expense, at the very least in terms of postage, copying costs, and additional labor, without adding any protection that the regulation does not already provide. In addition, the judgment of the court of appeals places an unnecessary strain upon the relationship between the federal judiciary and state prison administrators. The balance of interests simply do not mitigate in favor of providing publishers, including Montcalm, with individualized notice and an opportunity to be heard when their publications are disapproved for receipt into state prisons.

II. MONTCALM'S FAILURE TO CHALLENGE THE JUDICIAL DETERMINATION THAT *GALLERY* MAGAZINE IS PROPERLY EXCLUDED FROM VIRGINIA'S PRISONS REMOVED THIS CASE FROM THE SCOPE OF ARTICLE III JURISDICTION, THUS WARRANTING REVERSAL OF THE JUDGMENT BELOW

The magistrate judge's report and recommendation completely validated the VDOC decision to bar *Gallery* magazine from Virginia's prisons, noting that "[p]laintiffs do not argue that *Gallery* does not violate DOP 852." App. 52a. In fact, every monthly issue of *Gallery* published from September 1992 up to the December 1993 court hearing had been disapproved because of the magazine's

vivid descriptions of sexual intercourse of every nature imaginable. App. 35a. Even several issues that had been admitted into prison before September 1992 were, upon a better review, found violative of the regulation. App. 34a-35a. Nonetheless, because the *regulation* provided for regular reviews, rather than simply an outright ban of *Gallery*, the magistrate judge recommended that the district court require the VDOC to provide Montcalm notice and an opportunity to protest each and every time the VDOC disallows an issue of *Gallery* into Virginia's prisons. App. 54a-56a; 62a.

The district court rejected the inmates' objections to the report and recommendation, but found that the VDOC already afforded Montcalm adequate notice. Noting the diminished First Amendment interest a publisher has vis-á-vis inmate subscribers, the court found that the process afforded the inmates adequately protected the publisher's interest as well.

> The ability of Hodges and Flora, and other subscriber inmates, to challenge any decision to withhold a publication from them safeguards the First Amendment interests of both the subscriber inmates and the publishers. The additional procedural safeguards outlined by the magistrate judge would duplicate process and substantially increase administrative and fiscal burdens for the VDOC. In sum, the value of the extra procedures fails to justify the onerous burden they would create. The *Constitution* does not require them.

App. 27a (emphasis added).

Only Montcalm appealed. The court of appeals, apparently equating the publisher's First Amendment

interest to that of a mother writing her son in prison, App. 11a, found the procedures generally outlined in *Procunier v. Martinez*, 416 U.S. 396 (1974), *overruled in part* by *Thornburgh v. Abbott*, 490 U.S. 401 (1989), applicable, and instructed the district court to make "a determination of the appropriate process to be provided to publishers of rejected publications." App. 12a. The appeals court's determination to plow ahead and adjudicate the notice issue in the absence of a then existing case or controversy is so far afield of the acceptable and usual course of judicial proceedings as to necessitate the exercise of this Court's supervisory power. *Sup. Ct. R.* 10.

An elementary notion of Article III jurisdiction is that a case or controversy must exist at every stage of review. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *Steffel v. Thompson*, 415 U.S. 452 (1974); *see generally Secretary of the State of Maryland v. J. H. Munson Co.*, 467 U.S. 947 (1984); *Warth v. Seldin*, 422 U.S. 490 (1975). Once a final judicial determination had been made that the VDOC effectively, and correctly, banned *Gallery* from Virginia's prisons – an issue that became final when the inmates and Montcalm failed to appeal the district court's judgment on that issue – no case or controversy existed any longer.[4]

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[4] The court of appeals perhaps intended to suggest that Montcalm has standing to prosecute the notice challenge on behalf of all publishers. But if Montcalm itself does not demonstrate actual injury at every stage of the proceeding, the question of its jurisprudential standing will not be addressed. *See generally Secretary of the State of Maryland v. J. H. Munson Co., supra; Warth v. Seldin, supra.* We additionally note that Montcalm has never purported to stand in any shoes but its own.

The requirement of a live case or controversy becomes perhaps even clearer when the object of a lawsuit is to seek federal judicial intervention against state and local officials. *Rizzo v. Goode*, 423 U.S. 362, 378-380 (1976). Federalism principles militate against a grant of federal equitable relief other than "in the most extraordinary circumstances," *id.* at 379, a situation most obviously absent when the issue at bar has become moot. Despite this Court's repeated and pointed articulation of the federalism interest, this case serves as yet another prime example of a willingness to subordinate federalism concerns to a federal court's perceived need to grant equitable relief against state officials. *See, for example, Lewis v. Casey*, 64 U.S.L.W. 4587 (June 24, 1996). Requiring the VDOC to engage in a monthly discourse with Montcalm about whether one month's "Feedback" descriptions of voyeurism, fellatio, cunnilingus, masturbation combined with voyeurism, lesbian sexual intercourse combined with voyeurism, "daisy chains," sexual assault of a victim depicted as willing, adultery and the condonation of adultery combined with voyeurism, etc., is more or less explicit than issues previously disallowed, is fiscal and administrative unreason of an extremely high order. Yet it is precisely this senseless and wasteful discourse to which the Fourth Circuit's ruling, granting Montcalm

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Even where jurisprudential standing is permitted, the cases are limited to facial overbreadth challenges, which this case certainly is not. *See Broadrick v. Oklahoma*, 413 U.S. 601 (1973). We finally note that even if Montcalm had jurisprudential standing, its standing is properly limited to publishers of sexually explicit materials, that being the only portion of the incoming publications regulation at issue in this case.

prospective procedural relief, condemns the VDOC. Gross speculation that *Gallery* may one day change its stripes – or, as one of the lower court judges put it, "become Jack and Jill magazine" – is precisely what this Court has deemed to be completely inappropriate. *See Los Angeles v. Lyons*, 461 U.S. 95 (1983). The Fourth Circuit's insistence on demanding equitable relief on the broad issue of publisher notice in the absence of a live case or controversy demands corrective action from this Court.

CONCLUSION

For the reasons stated above, the Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,
EDWARD MURRAY, *et al.*

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MONTCALM PUBLISHING CORPORATION, *Plaintiff-Appellant,* and DONALD ARLIS HODGES; MICHAEL GLYNN FLORA, *Plaintiffs,* v. R.J. BECK; J. HORTON; R.A. YOUNG; E.C. MORRIS; MS. SUMMERS; EDWARD MURRAY, in his official capacity as Director of the Department of Corrections of the Commonwealth of Virginia; John Doe, 1 – 7, in their official capacities such fictitious names being designated to identify those VDOC employees whose true identities are now unknown to plaintiff-intervenor, but who serve as (a) members of the VDOC Publication Review Committee, (2) Warden or Superintendent of Keen Mountain Correctional Center (KMCC), and (3) functional KMCC mailroom censor; J. PHIPPIN; MR. BECK; COMMONWEALTH OF VIRGINIA, *Defendants-Appellees.*	)	No. 95-6190

Appeal from the United States District Court
for the Western District of Virginia, at Roanoke,
Samuel G. Wilson, District Judge.
(CA-92-696-R, CA-92-907-R)

Argued: December 8, 1995

Decided: April 2, 1996

Before ERVIN and MOTZ, Circuit Judges, and WILLIAMS, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Reversed by published opinion. Judge Ervin wrote the opinion, in which Judge Motz and Senior Judge Williams joined.

COUNSEL

ARGUED: Keith S. Orenstein, ORENSTEIN & ORENSTEIN, P.C., New York, New York, for Appellant. Mark Ralph Davis, Assistant Attorney General, Criminal Law Division, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellees. **ON BRIEF:** James S. Gilmore, III, Attorney General, Mary E. Shea, Assistant Attorney General, Criminal Law Division, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellees.

OPINION

ERVIN, Circuit Judge:

A Virginia Department of Corrections ("VDOC") Operating Procedure allows prison authorities to deny

inmates access to obscene publications. A publisher of disapproved magazines appeals the district court's ruling that the policy is constitutional in spite of its failure to provide for notice to such publishers. We hold that publishers are entitled to notice and an opportunity to be heard when their publications are disapproved for receipt by inmate subscribers. Accordingly, we reverse the judgment of the district court.

I.

VDOC Department Operating Procedure ("DOP") 852 allows prison officials to deny inmates access to certain written publications, including those deemed obscene. The rule establishes a procedure by which the warden or superintendent approves or disapproves publications "on a case-by-case and/or issue-by-issue" basis. The warden or his designee reviews all publications received at the jail and all inmate requests for publications to determine whether they are permissible. If the warden deems them disallowed, he must make a written record, inform the inmate of the decision, and inform the inmate of the right to appeal. A Publication Review Committee reviews denials "to ensure department-wide consistency in those publications disapproved for entry into facilities," and a list of all disapproved publications is circulated to all prisons.

The policy specifically defines obscenity:

> 1. The publication depicts or describes sexual conduct in such a way to include, either:

a. Representation or descriptions of actual sexual intercourse, normal or perverted, anal or oral; or,

b. Representations or descriptions of excretion in the context of sexual activity; and

2. A reasonable person viewing the depiction or representation would find that the material taken as a whole appeals to a prurient interest in sex.

A publication may also be disapproved on the grounds that it has not been received in accordance with procedure; its content "may be detrimental to the security, good order or discipline of the institution"; or it contains instructions on manufacturing weapons or drugs, violence or terrorist activities, defeating security devices, or physically disabling another person.

Appellant Montcalm Publishing Corporation publishes *Gallery*, a monthly magazine that includes "*inter alia* articles, fiction, commentary, photographic layouts of nude women, and paid advertisements." Montcalm claims that *Gallery* has never been deemed obscene in a court action to which Montcalm was a party.

Michael Flora and Donald Hodges, inmates at the Keen Mountain Correctional Center (KMCC), subscribed to *Gallery*. When VDOC notified them that they would not be allowed to receive the June and September 1992 issues, Hodges and Flora initiated pro se civil rights actions. Prison officials had based their decision to disapprove the magazines on some of the written content, not the nude photographs. Later, two previously approved issues were disapproved. Montcalm was permitted to

intervene in the prisoners' action after learning of the suit by way of Flora's request for a refund of his subscription fee.

Magistrate Judge Cynthia Kinser held a hearing, and issued a Report-Recommendation. She recommended that judgment be entered in favor of the defendants, except as to Montcalm's procedural due process claim. She found that, although the regulation adequately safeguarded inmates' procedural due process rights, the same was not true as to publishers, who "have no way of knowing when their publications have been banned from the prisons." Magistrate Judge Kinser found that providing procedural protection to publishers of disapproved publications would impose a minimal burden on prison authorities. Moreover, to the VDOC's argument that granting injunctive or declaratory relief to Montcalm would be useless now that the publisher actually has notice that *Gallery* violates the regulation, Judge Kinser held that the policy in fact mandates case-by-case or issue-by-issue determinations, and that the prisons will review disapproved publications "again and again." She held that, at a minimum, the publisher must be given notice, the opportunity to protest, and review by a disinterested party.

The district court upheld the obscenity regulation, and determined that Montcalm was not entitled to notice and an opportunity to be heard. *Hodges v. Commonwealth of Virginia*, 871 F. Supp. 873 (W.D. Va. 1994). The court first found that prison authorities' decisions to withhold inmate mail must provide minimum procedural safeguards in light of the First Amendment concerns of

inmates and their correspondents. *Id.* at 878 (citing *Procunier v. Martinez*, 416 U.S. 396, 417-18 (1973), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989)). The court distinguished the safeguards required in cases of personal mail from those dealing, as here, with magazines. *Id.* Analyzing the case under the factors specified in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1975), the district court concluded that "the First Amendment interests of Montcalm, and similar publishers, are adequately protected by the procedures outlined in DOP 852." *Id.* at 878-80. The court noted that subscriber-inmates can challenge the decision to withhold a publication, which protects the First Amendment interests of the publisher, and concluded that "the value of the extra procedures fails to justify the onerous burden they would create." *Id.* at 880.

II.

Issues of law are reviewed *de novo* on appeal. *Waters v. Gaston County, N.C.*, 57 F.3d 422, 425 (4th Cir. 1995).

The Supreme Court has recognized that the First Amendment plays an important, albeit somewhat limited, role in the prison context. In *Procunier v. Martinez* the Court considered the proper standard of review for prison regulations that restrict inmates' freedom of speech. 416 U.S. 396, 406 (1974). The Court specifically limited its consideration to regulations of "direct personal correspondence between inmates and those who have a particularized interest in communicating with them," *id.* at 408, as opposed to "mass mailings," for which "[d]ifferent considerations may come into play," *id.* at n.11. The Court found that censorship of inmate mail –

whether the inmate writes or receives it – "works a consequential restriction on the First and Fourteenth Amendment rights of those who are not prisoners." *Id.* at 409. The Court held that censorship of prisoner mail is justified if, first, "the regulation or practice in question[ ] further[s] an important or substantial governmental interest unrelated to the suppression of expression." *Id.* at 413. Second, restrictions of First Amendment free speech must be "no greater than is necessary or essential to the protection of the particular governmental interest involved." *Id.* The *Martinez* Court further held that "the decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards." *Id.* at 417. The Court upheld the district court's requirements of notice to the inmate, the opportunity for the letter's author (inmate or otherwise) to protest, and review by someone other than the initial decision-maker. *Id.* at 418-19.

The Supreme Court clarified the standard to be applied when addressing the constitutionality of prison rules in *Turner v. Safley.*[1] 482 U.S. 78 (1987). The Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89. The decision specifically rejected the application of strict

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[1] *Turner* may have been superseded by the Religious Freedom Restoration Act, 42 U.S.C.A. §§ 2000bb to 2000bb-4 – an issue we do not decide. Since no such religious interests are at stake here, the *Turner* reasonableness standard governs.

scrutiny, in deference to the judgments of prison administrators faced with difficult problems. *Id.* The Court articulated a number of factors to guide the review process: a "valid, rational connection" between the challenged regulation and the interest that justifies it; "whether there are alternative means of exercising the right that remain open to prison inmates"; how accommodation of the prisoners' right will affect prison staffing and resource allocation; and whether "ready alternatives" are available. *Id.* at 89-90 (quotations and citations omitted). The Court applied these factors and upheld a Missouri prison regulation that prohibited correspondence between inmates in different prisons, finding it to be based on legitimate security concerns. *Id.* at 91.

In 1989 the Supreme Court held that the *Turner* reasonableness standard must be applied to regulations of publications. *Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989). At issue were federal regulations that allowed federal prisoners to subscribe to publications, but allowed prison authorities to reject publications deemed harmful to security, order, or discipline. *Id.* at 404. The regulations provided procedural protection, including notice and independent review. *Id.* at 406. The Court specifically limited *Martinez* to "regulations concerning outgoing correspondence," which the Court found to pose no significant danger *inside* the prison. *Id.* at 411-13. The Court also specifically overruled *Martinez* to the extent that it suggested a "distinction between incoming correspondence from prisoners . . . and incoming correspondence from nonprisoners." *Id.* at 413-14.

The *Abbott* Court explicitly pointed out that the regulations at issue in that case established procedural protection, including providing the publisher or sender of rejected publications a copy of the rejection letter and allowing the publisher to obtain independent review of the decision. *Id.* at 406. Three lower courts have similarly held that those who send written communications to inmates are entitled to notice and an opportunity to be heard when those communications are censored or withheld. In *Martin v. Kelley,* the Sixth Circuit required that notice and an opportunity to protest be provided to the "author of [a] rejected letter," because the author's First Amendment interests are implicated by the rejection, and the author's assistance may be necessary for the inmate's efforts to challenge the decision. 803 F.2d 236, 243-44 (6th Cir. 1986). The Eighth Circuit reached a similar decision in *Trudeau v. Wyrick,* 713 F.2d 1360, 1366 (8th Cir. 1983). Both of these cases dealt with personal letters, however, which aligns them more closely with *Martinez* than with the present case. *Cofone v. Manson,* 409 F. Supp. 1033 (D. Conn. 1976), is a closer case. The court held that "the prisoner, himself, has the right to the publisher's aid in submitting written objections to the [l]ibrary [c]ommittees," since the publisher is familiar with the material. *Id.* at 1042. Appellees contend that *Cofone* is a questionable precedent, because the inmate-plaintiff may not have had standing to raise the issue of publisher notice.

The cases on which the district court relied in ruling that Montcalm was entitled to no procedural protection when its magazines are withheld do not resolve the question. First, the court cited *Jones v. North Carolina Prisoner's*

Union, in which the Supreme Court held that a prohibition against bulk mailings by a prisoner's union was reasonable, given the availability of alternative means to share information. 433 U.S. 119, 130-31 (1977) ("First Amendment speech rights are barely implicated in this case" because only bulk mailings were at issue, not "mail rights" themselves.). *Jones* does not control the outcome of this case for two reasons. First, this case does not concern bulk mailings, but rather the sending of publications to those who have specifically subscribed to them. Second, the *Jones* Court simply held that the prisoners' loss of the ability to save money by using bulk mail did not implicate the First Amendment. In this case, prisoners are completely precluded from receiving the publications to which they have subscribed.

The district court also relied on *Gregory v. Auger*, 768 F.2d 287 (8th Cir.), *cert. denied*, 474 U.S. 1035 (1985). The Eighth Circuit upheld an Iowa prison policy that restricted the mail privileges of inmates in disciplinary detention, and held that particular chambers of commerce which sent mail temporarily withheld from an inmate were not entitled to notice. *Id.* at 291. The court found no indication "that the chambers of commerce had any particularized interest in being apprised of when [the inmate] received his mail." *Id.* The district court in the present case held that Montcalm similarly had "no special interest in immediate communication with Hodges and Flora." But *Gregory* also fails to resolve the precise issue before this court, because the mail at issue in that case was withheld only temporarily, whereas VDOC has permanently disallowed the *Gallery* magazines.

The Supreme Court has clearly recognized a First Amendment interest in those who wish to communicate with prison inmates, although it has expressly reserved the question of how that interest operates in the case of "mass mailings." We do not believe, however, that mass mailings are at issue. Although Montcalm mails *Gallery* to thousands of subscribers nationwide, this case involves only the relationship between Montcalm and particular inmate-subscribers.[2] Despite the First Amendment's somewhat limited reach in the prison context, it cannot fairly be said that Montcalm has no First Amendment interest at stake.

Having recognized that Montcalm indeed has a constitutional interest in communicating with its inmate-subscribers, we cannot conclude that it is entitled to no process at all when VDOC prevents the subscribers from receiving Montcalm's publications. An inmate who cannot even see the publication can hardly mount an effective challenge to the decision to withhold that publication, and while the inmate is free to notify the publisher and ask for help in challenging the prison authorities' decision, the publisher's First Amendment right must not depend on that.

At present, VDOC procedures require written notice to inmates when a publication is disapproved. We believe that providing a copy of this notice to publishers of disapproved publications and allowing the publishers to respond in writing would pose a minimal burden on

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[2] In contrast, a publisher who wished to send a particular publication to each and every inmate at a given institution could be said to be undertaking a mass mailing.

corrections officials. We note, however, that on remand the district court is free to fashion the remedy it deems most appropriate.

III.

We reverse the decision of the district court denying all relief to Montcalm, and remand for a determination of the appropriate process to be provided to publishers of rejected publications.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
IN THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

DONALD A. HODGES,	)	
Plaintiff,	)	Civil No. 92-0696-R
v.	)	
COMMONWEALTH OF VIRGINIA, et al.,	)	
Defendants.	)	Civil No. 92-0907-R
and	)	
MICHAEL G. FLORA,	)	
Plaintiffs,	)	**MEMORANDUM OPINION**
v.	)	
COMMONWEALTH OF VIRGINIA, et al.,	)	
Defendants.	)	(Filed Dec. 19, 1994)
and	)	
MONTCALM PUBLISHING CORP.,	)	
Plaintiff-Intervenor,	)	
v.	)	
EDWARD W. MURRAY, et al.,	)	
Defendants.	)	

This is a disposition of two actions filed separately under 42 U.S.C. § 1983 by plaintiffs, Donald A. Hodges

and Michael G. Flora, who assert that Keene Mountain Correctional Center's ("KMCC") publication policy, which restricts inmate access to sexually explicit publications, infringes upon their First Amendment rights. Hodges and Flora named the Commonwealth of Virginia and individual employees at the KMCC as defendants.[1] Montcalm Publishing Corporation ("Montcalm"), owner and publisher of *Gallery* magazine, the publication that was denied to Hodges and Flora under the challenged policy, intervened in both actions as an additional plaintiff. Montcalm further named Edward C. Murray, director of the Virginia Department of Corrections ("VDOC"), and John Does 1-7, unknown VDOC employees, as defendants.

Pursuant to 28 U.S.C. § 636, the United States Magistrate Judge conducted a joint evidentiary hearing of the complaints lodged by Hodges and Flora. In a thoughtful report, the magistrate judge found that KMCC's publication policy was substantively constitutional, on its face and as applied. However, the magistrate judge found that the publication policy, which requires notification to an inmate when a publication addressed to him is denied entry into the prison but does not require notification to the publisher sending the material, failed to provide the necessary procedural safeguards to publishers such as Montcalm. The magistrate judge concluded that the publication policy was substantively reasonable, but procedurally defective, and she recommended that judgement be entered accordingly. The magistrate judge

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[1] Hodges named R.J. Beck, J. Horton, R.A. Young, E.C. Morris, and Ms. Summers. Flora named M. Beck and J. Phippin.

further recommended that injunctive relief be granted requiring the VDOC to provide procedural safeguards as outlined in her report.

The matter is now before this court on objections to the magistrate judge's report by plaintiffs and defendants. The court finds that KMCC's publication policy does not infringe upon the constitutional rights and protections of plaintiffs. As such, the court will adopt the magistrate judge's recommended findings of fact and conclusions of law in regards to the substantive constitutionality of KMCC's publication policy. Contrary to the magistrate judge's recommendation, however, the court finds that the policy satisfies the requirements of procedural due process.

I.

Donald Arlis Hodges and Michael Glynn Flora are inmates at KMCC located in Keene Mountain, Virginia. Hodges and Flora both subscribe to *Gallery* magazine, a publication which contains sexually explicit writings and nude photos of women posing alone in various settings. Inmates held in Virginia prisons are allowed access to publications of their choice subject to limited prison regulations.

In June of 1992, KMCC personnel inspected the June issue of *Gallery* and, suspecting that the publication violated Department Operating Procedure ("DOP") 852,[2]

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[2] This regulation provides that:

> The warden/superintendent, or his designee, will disapprove a publication for receipt and possession by an inmate on grounds of obscenity if:

forwarded it to the Publication Review Committee ("PRC") of the Virginia Department of Corrections in Richmond, Virginia.[3] Upon review of *Gallery*'s June issue,

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1. The publication depicts or describes sexual conduct in such a way to include, either:
   a. Representation or descriptions of actual sexual intercourse, normal or perverted, anal or oral; or,
   b. Representations or descriptions of excretion in the context of sexual activity or lewd exhibitions of uncovered genitals in the context of masturbation or other sexual activity; and
2. A reasonable person viewing the depiction or representation would find that the material taken as a whole appeals to a prurient interest in sex.

Department operating Procedure 852 VII. D [hereinafter DOP 852].

[3] KMCC follows certain procedures when a publication possibly violative of DOP 852 enters the institution. The postal clerks conduct an initial inspection of the publication. If it appears to be prohibited under DOP 852, the publication is forwarded to the warden or his designee, who conducts a second inspection. If the warden determines that the issue violates DOP 852, the inmate subscriber is notified of the name of the publication, the issue, and the page numbers of concern. The publication is then sent to the PRC in Richmond, Virginia, which makes a final determination regarding the violative nature of the publication. If the PRC finds that the publication complies with DOP 852, it is returned to the KMCC and delivered to the subscriber inmate. If the PRC concludes that the publication violates DOP 852, the publication is returned to the KMCC and the subscriber inmate determines whether the publication be destroyed or sent elsewhere. Over time, the PRC creates a "Disapproved Publications List" which instructs prison personnel of those publications violative of DOP 852 and which should be barred.

the PRC determined that the written material violated DOP 852 and disapproved its delivery to Hodges and Flora.[4] KMCC delivered the July 1992 issue of *Gallery* to Hodges and Flora without objection. However, it forwarded the August 1992 issue to the PRC for review, which then approved the issue for dissemination.[5] Beginning with the September 1992 issue of *Gallery*, the PRC has consistently disapproved the magazine for delivery to inmates.

Hodges filed a complaint pursuant to 42 U.S.C. § 1983 alleging that KMCC's application of DOP 852 violated his constitutional rights. Several months later, Flora filed a similar action under § 1983 challenging the constitutionality of DOP 852. Montcalm intervened in both suits as an interested plaintiff. The magistrate judge conducted a joint evidentiary hearing of the cases and issued a report and recommendation. The matter is now before this court on objections to the magistrate's report and recommendation by the plaintiffs and the defendants.

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[4] KMCC personnel had forwarded *Gallery*'s February, March, April, and May 1992 issues to the PRC for review. The PRC approved each publication, apparently on the basis of its pictorial content only – the KMCC personnel had not flagged the written material for review.

[5] Since the initiation of this suit, the PRC has examine[d] the July 1992 issue, reexamined the August 1992 issue, and concluded that both issues violate DOP 852.

II.

In her report and recommendation, the magistrate judge first analyzed whether DOP 852 infringes upon the plaintiffs' First Amendment rights, either on its face or as applied. Reiterating the standard articulated by the Supreme Court in *Thornburgh v. Abbott*, 490 U.S. 401 (1989), the magistrate judge stated that prison regulations which restrict publications delivered to inmates must be "reasonably related to legitimate penological interests." (Mag. Rep. & Rec. at 28, May 5, 1994.) In determining whether the standard had been met, the following factors, set forth in *Turner v. Safley*, 482 U.S. 78, 89 (1987), guided the magistrate judge's analysis:

1. Whether the regulation is neutral and reasonably related to a legitimate governmental interest;

2. Whether alternative means are available to the inmate to exercise the asserted right in question;

3. Whether accommodating that right will have a significant ripple effect on fellow inmates, prison staff and prison personnel; and

4. Whether the alternatives available suggest that the status quo is actually an exaggerated response to prison concerns.

The magistrate judge concluded that DOP 852 *is* reasonably related to a legitimate governmental interest. The articulated penological interests at stake, including security, discipline, order, public safety, and rehabilitation, were found to be legitimate. Giving deference to the testimony of Edward C. Morris, Deputy Director of the

VDOC, who stated that publications which violate DOP 852 "significantly hinder inmate rehabilitation," the magistrate judge found that the regulation was reasonably related to a valid governmental interest.[6] (Mag. Rep. & Rec. at 14-15.) It was further concluded that DOP 852 is neutral because it is objective and unambiguous, and its distinctions are based on the potential impact the publications may have on legitimate penological interests. (Mag. Rep. & Rec. at 29.)

Turning to the second factor, the magistrate judge found that alternative means of exercising the First Amendment right *were* available to Virginia inmates because DOP 852 does not deprive inmates of all sexually explicit publications. (Mag. Rep. & Rec. at 30.) However, in a footnote, the magistrate judge expressly reserved the question of whether the VDOC could ban all sexually explicit material. (Mag. Rep. & Rec. at 18, n.17.) Under the third factor, it was found that accommodation of the plaintiffs' First Amendment rights would adversely affect the rehabilitation process – specifically, a significant negative ripple effect would occur within the prison in the form of increased bartering. (Mag. Rep. & Rec. at 19.)

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[6] In her conclusions of law, the magistrate judge stated that "[a] lack of empirical evidence substantiating a causal connection between excluding *Gallery* publications and security, order or successful rehabilitation is not necessary." (Mag. Rep. & Rec. at 29.) Although the double negative in this sentence changes it to mean that empirical evidence is indeed necessary in order to establish a causal connection, the magistrate judge concluded that a sufficient causal connection exists and she did not mention the empirical evidence relied upon. As such, the court suspects that the double negative is a grammatical error and will treat it as such.

Last, the magistrate judge concluded that no less intrusive alternatives were readily available to the VDOC in preservation of its penological interests. (Mag. Rep. & Rec. at 19-20.)

The magistrate judge then considered the constitutionality of DOP 852 as applied. Rejecting the argument that DOP 852 is applied in an arbitrary and capricious manner, the court attributed the few inconsistencies in the approval of *Gallery* for dissemination as forgivable imperfections in the VDOC's system of review. In sum, the magistrate judge found that DOP 852 does not violate the plaintiffs' First Amendment rights, either substantively or as applied.

Plaintiffs Hodges and Flora object to the portion of the magistrate judge's report and recommendation detailed above. They have lodged specific objections to numerous findings – both factual and legal. After review of the report and recommendation, however, this court finds that the magistrate judge conducted a proper analysis of the plaintiffs' First Amendment rights. As such, it will adopt the magistrate judge's report with several modifications.

As stated previously, a prison regulation that restricts the delivery of publications to inmates must be reasonably related to a legitimate penological interest. The interests articulated by the VDOC, security, discipline, order, public safety, and rehabilitation, need no defense. The more compelling question here is whether sexually explicit publications have a negative impact on those interests. In her report and recommendation, the magistrate judge acknowledged such a causal connection based

upon the assertions of the VDOC's Deputy Director, which merit deference, and she held that empirical evidence need not necessarily establish that connection. This court agrees. However, the magistrate judge's failure to rely upon empirical evidence regarding this issue should not be read to mean that none exists.[7] Neither is this issue one of first impression. Other courts have found that sexually explicit publications negatively impact valid penological interests.[8] These considerations further support the connection between DOP 852 and KMCC's interests.

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[7] Indeed, studies have been published which show such correlations. *See* Sheila J. Winkelman, *Making a Woman's Safety More Important Than Peep Shows: A Review of the Pornography Victims' Compensation Act*, 44 WASH. U. J. URB. & COMTEMP. L. 237 (1993) (finding empirical support of a connection between sexually explicit publications and violence in 1986 ATT'Y GEN. COMM'N ON PORNOGRAPHY FINAL REP. and other studies). *But see* George C. Thomas, III., *A Critique of the Anti-Pornography Syllogism*, 52 MD. L. REV. 122 (1993) (concluding that the link between pornography and rape is conjectural).

[8] *See Dawson v. Scurr*, 986 F.2d 257, 261 (8th Cir. 1993) (finding a "rational connection" between the penological interests of security and rehabilitation and the restriction of certain sexually explicit publications), *cert. denied*, 114 S. Ct. 232 (1993); *Thompson v. Patteson*, 985 F.2d 202, 206 (5th Cir. 1993) (finding that pornographic materials could exacerbate problems of nonconsensual homosexual acts within the prison); *Harper v. Wallingford*, 877 F.2d 728, 733 (9th Cir. 1989) (stating that an organizational bulletin of the North American Man/Boy Association could encourage violence within the prison and undermine rehabilitation).

III.

The magistrate judge next analyzed whether the plaintiffs, Hodges, Flora, and Montcalm, were afforded procedural due process when KMCC withheld *Gallery* from dissemination. In her report and recommendation, the magistrate judge concluded that DOP 852 does not adequately protect the interests of publishers, such as Montcalm, because it fails to require notification of a publisher whose publication is denied entry into the prison.[9] (Mag. Rep. & Rec. at 25.) The magistrate judge stated that minimum safeguards include notice to the publisher, an opportunity for the publisher to protest an adverse determination, and a disinterested party review of the original decision to exclude the publication. (Mag. Rep. & Rec. at 31.) The magistrate judge recommended declaratory and injunctive relief in favor of Montcalm. The defendants have objected to the magistrate judge's due process analysis, which would require them to notify a publisher every time it rejects a publication. The defendants further object to an award of declaratory or injunctive relief on the grounds that it would serve no practical purpose since Montcalm has actual notice that its publications were withheld. After close review of the issue, this court finds that the VDOC provides sufficient procedural

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[9] According to DOP 852, the VDOC must provide notification to an inmate whose publication will not be delivered. The inmate may then appeal the decision through the Inmate Grievance Procedure. The publisher is not notified, however. *See supra* note 3. The magistrate judge concluded that these procedures adequately protect the interests of subscriber inmates such as Hodges and Flora. (Mag. Rep. & Rec. at 25.) This court agrees and will not address that issue further.

safeguards to publishers, such as Montcalm, that circulate materials to a general audience.

When a prison withholds inmate mail, it must provide minimum procedural safeguards to protect the First Amendment liberty interest of prisoners and their correspondents. *Procunier v. Martinez*, 416 U.S. 396, 417-18 (1973), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989). In *Procunier v. Martinez*, the Supreme Court affirmed a district court's judgment that a prison must notify an inmate of "the rejection of a letter written by or addressed to him, that the author of that letter be given a reasonable opportunity to protest that decision, and that complaints be referred to a prison official other than the person who originally disapproved the correspondence." *Id.* That decision determines the procedural safeguards necessary in the instance of personal correspondence, however, not widely-distributed publications aimed towards a general audience. Publishers, indeed, have a First Amendment interest in communicating with prisoners who seek their point of view through subscriptions. *Thornburgh v. Abbott*, 490 U.S. at 408. However, that interest is lesser than the interest held by authors of personal correspondence.[10] Thus, the procedural safeguards required in the context of withholding *Gallery* from an

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[10] First Amendment interests exist in different magnitudes. For example, the interest implicated in sending or receiving a personal letter is greater than the interest implicated in sending or receiving a generalized publication, which in turn is greater than the interest implicated in sending or receiving bulk mailings. *See Jones v. North Carolina Prisoner's Union*, 433 U.S. 119, 130-31 (1976) (stating that "First Amendment speech rights are barely implicated" when bulk mailings are restricted from a prison).

inmate need not be identical to those required when a letter written by an inmate or addressed to him is withheld. The Supreme Court has not articulated the procedural safeguards necessary to protect a publisher's First Amendment interest when its publication is withheld from a prison. Neither has the Fourth Circuit addressed the issue. As such, this question is one of first impression for the court.

When determining the amount and nature of procedural safeguards required, a court should consider the following factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1975). Due process is not a technical concept, however, wholly unrelated to the unique time, place and circumstances involved: "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

At stake here is Montcalm's First Amendment interest in communicating with Hodges and Flora through its publication, *Gallery*. As recognized above, Montcalm possesses such an interest, which is theoretically infringed when its publication is not delivered to subscribing

inmates. Because *Gallery* is aimed towards a general audience, however, Montcalm's interest in communicating specifically with Hodges and Flora is attenuated. The implication of Montcalm's interest is further diminished by the fact that, according to DOP 852, Hodges and Flora may request that withheld publications, such as *Gallery*, be sent elsewhere – perhaps to a friend, family member, or other location where the publications may be stored until these inmates are released from prison. In such a scenario, Montcalm's communication with Hodges and Flora is not prevented, but only delayed. Montcalm has no special interest in immediate communication with Hodges and Flora. *See Gregory v. Auger*, 768 F.2d 287, 291 (8th Cir. 1985) (finding that a chamber of commerce had no "particularized interest" of being notified that its mailings were temporarily withheld from an inmate), *cert. denied*, 474 U.S. 1035 (1985).

The court must next consider whether DOP 852 poses an undue risk of erroneously depriving Montcalm and other publishers of their First Amendment interests and whether additional or alternative procedures would provide more valuable safeguards. The VDOC's current procedural mechanism provides a subscriber inmate notice and an opportunity to challenge PRC's decision to withhold a publication. Providing the publisher these same procedures, notice and an opportunity to challenge, would surely safeguard any of its First Amendment interests that are implicated. However, the question is whether the additional procedures would provide a necessary safeguard that is now absent or whether they would merely duplicate the safeguards already provided

through the subscriber inmate. Since the First Amendment interests of both inmate and publisher are implicated through one act of correspondence, a challenge by the subscriber inmate to a decision withholding that correspondence would also address the interests of the publisher.[11] In essence, a subscriber inmate has the means to protect both his own First Amendment interests and those of a publisher when he challenges the PRC's decision.[12] It also seems appropriate that the subscriber inmate be the party to challenge the PRC's decision because the publisher's right to communicate with an

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[11] Although a subscriber inmate has no access to the suspect publication when he challenges the prison's decision to withhold it, this fact, alone, fails to show that he cannot adequately protect both his own and the publisher's First Amendment interests. If a subscriber inmate wishes to mount a serious challenge to a prison's withholding decision, he could request that the publication be sent to a family member or friend who could then assist him. Furthermore, nothing prevents the subscriber inmate from notifying and enlisting the help of the publisher as he challenges the decision to withhold its publication.

[12] The ability of one party to raise, and thus protect, the rights of another party has long been accepted in contexts where the first party is in a better position to act. For example, criminal juries cannot be selected on racial grounds because it violates the Fourteenth Amendment rights of potential jurors and criminal defendants. *Akins v. Texas*, 325 U.S. 398 (1945); *Batson v. Kentucky*, 476 U.S. 79, 87 (1985). Although a criminal defendant has no right to a jury of the same race, he may challenge the selection of a jury as discriminatory. *Atkins v. Texas*, 325 U.S. at 403. Thus, the criminal defendant protects both his own right to a fairly chosen jury and the rights of prospective jurors to participate in jury service without discriminatory exclusion.

inmate can be no greater than the inmate's right to receive that communication.

The last factor for consideration is the government's interest. Requiring the VDOC to notify a publisher every time it withholds a publication from an inmate would be an onerous burden. Although the magistrate judge recommended that the publisher be sent only a copy of the notification given to the inmate, this, in itself, requires the VDOC to allocate significantly more money and labor to the regulation of prisoner mail. At a minimum, it would result in additional postage and copying costs and in more employee time spent compiling publisher's addresses, copying notification letters, and addressing envelopes. The VDOC would incur even further expense when providing the publisher an opportunity to challenge the PRC's decision and allowing for disinterested review. At a time when resources are scarce, these additional procedures would significantly burden the VDOC.

After considering the relevant factors, this court finds that the First Amendment interests of Montcalm, and similar publishers, are adequately protected by the procedures outlined in DOP 852. The ability of Hodges and Flora, and other subscriber inmates, to challenge any decision to withhold a publication from them safeguards the First Amendment interests of both the subscriber inmates and the publishers. The additional procedural safeguards outlined by the magistrate judge would duplicate process and substantially increase administrative and fiscal burdens for the VDOC. In sum, the value of the extra procedures fails to justify the onerous burden they would create. The Constitution does not require them.

IV.

Accordingly, the court will adopt the magistrate judge's report and recommendation in part and modify it in part as set forth above.

ENTERED this 19th day of December, 1994.

/s/ Samuel G. Wilson
UNITED STATES
DISTRICT JUDGE

A TRUE COPY, TESTE:
MORGAN E. SCOTT, JR., CLERK

BY: /s/ Carolyn Proffitt
DEPUTY CLERK

APPENDIX C

UNITED STATES DISTRICT COURT
IN THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

DONALD A. HODGES, Plaintiff, v. **COMMONWEALTH OF VIRGINIA, et al.,** Defendants. and **MICHAEL G. FLORA,** Plaintiff, v. **COMMONWEALTH OF VIRGINIA, et al.,** Defendants. and **MONTCALM PUBLISHING CORP.,** Plaintiff-Intervenor, v. **EDWARD W. MURRAY, et al.,** Defendants.	Civil No. 92-0696-R Civil No. 92-0907-R **FINAL ORDER** (Filed Dec. 19, 1994)

For the reasons stated in the Memorandum Opinion entered on this date, it is **ORDERED** and **ADJUDGED** that judgment be and the same hereby is entered in favor

of defendants, the Commonwealth of Virginia, R.J. Beck, J. Horton, R.A. Young, E.C. Morris, Mrs. Summers, M. Beck, J. Phippin, Edward C. Murray, and John Does 1-7, and against plaintiffs, Donald A. Hodges, Michael G. Flora, and Montcalm Publishing Corporation.

Plaintiffs are advised that they may appeal this decision pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure by filing a notice of appeal with this court within thirty (30) days of the date of entry of this Order, or within such extended period as the court may grant pursuant to Rule 4(a)(5).

The Clerk is directed to send certified copies of this Order and the accompanying Memorandum Opinion to each of the plaintiffs and to counsel of record for the defendants.

ENTERED this 19th day of December, 1994.

/s/ Samuel G. Wilson
UNITED STATES
DISTRICT JUDGE

A TRUE COPY, TESTE:
MORGAN E. SCOTT, JR., CLERK

BY: /s/ Carolyn Proffitt
DEPUTY CLERK

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

DONALD A. HODGES

Plaintiff

CIVIL ACTION NO. 92-0696-R

v.

COMMONWEALTH OF VIRGINIA, et. al.

Defendants

MONTCALM PUBLISHING CORP.

Plaintiff-Intervenor

v.

EDWARD W. MURRAY, et al.

Defendants.

and

MICHAEL G. FLORA

CIVIL ACTION NO. 92-0907-R

Plaintiff

v.

(Filed May 5, 1994)

COMMONWEALTH OF VIRGINIA, et al.

Defendants.

Report and Recommendation
By: Cynthia D. Kinser
United States Magistrate Judge

Donald A. Hodges ("Hodges") and Michael G. Flora ("Flora"), inmates at Keen Mountain Correctional Center ("KMCC"), filed separate *pro se* civil actions pursuant to 42 U.S.C. § 1983. They allege that defendants violated their First Amendment rights by prohibiting their receipt of *Gallery* magazine. Jurisdiction is pursuant to 28 U.S.C. § 1343. The defendants' motions for summary judgment were denied, and United States District Judge Samuel G. Wilson referred these cases to the undersigned United States Magistrate Judge to conduct appropriate proceedings pursuant to 28 U.S.C. § 636(b)(1)(B). Montcalm Publishing Company ("Montcalm"), the publisher of *Gallery* magazine, moved to intervene in the suit. The court granted the motion on September 30, 1993, and consolidated these cases for trial. On December 13, 1993, this court conducted an evidentiary hearing and now offers this report recommending that judgment be entered for defendants, except on the issue of the publisher's procedural due process rights.

I. Facts

Hodges and Flora are inmates at KMCC. Hodges is serving a forty year term for sodomy and rape. (Transcript ("Tr.") at 19). Flora is serving forty years for robbery and malicious wounding. (Tr. at 30). Hodges and Flora both subscribed to *Gallery* magazine,[1] a pornographic magazine which describes in graphic written

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[1] At KMCC, inmates earn approximately $25.00-$30.00 per month for various jobs they perform at the institution and may spend this money on items, such as cigarettes, clothes, or subscriptions to magazines.

detail coitus, fellatio, and cunnilingus. They each received the monthly publication until the Publication Review Committee ("PRC") of the Virginia Department of Corrections ("VDOC") determined that the magazine violated Departmental Operating Procedure ("DOP") 852.[2]

When KMCC receives a pornographic magazine, such as *Gallery*, the postal clerks conduct an initial inspection to determine whether it violates DOP 852. If it appears to violate DOP 852, they forward the magazine to the warden or his designee, who conducts a second inspection. If this inspection also results in finding the publication to violate DOP 852, the inmate is informed of the name of the publication, the issue, and the page numbers which violate the DOP. (Tr. at 180). The publication

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[2] DOP 852 VIII.D. provides:

The Warden/Superintendent, or his designee, will disapprove a publication for receipt and possession by an inmate on grounds of obscenity if:

1. The publication depicts or describes sexual conduct in such a way to include, either:
   a. Representation or descriptions of actual sexual intercourse, normal or perverted, anal or oral; or,
   b. Representations or descriptions of excretion in the context of sexual activity or lewd exhibitions of uncovered genitals in the context of masturbation or other sexual activity; and
2. A reasonable person viewing the depiction or representation would find that the material taken as a whole appeals to a prurient interest in sex.

is then forwarded to the PRC[3] in Richmond, Virginia. The PRC makes the final determination as to whether the publication violates DOP 852.

Specifically, the PRC reviews the parts of the publication that the KMCC personnel mark as the basis for the alleged DOP violation. If it determines that the material complies with the DOP, it returns the publication to the inmate. If, however, the PRC concludes that the publication violates the DOP, it returns the publication to the institution, which then allows the inmate the option of having the magazine either destroyed or sent elsewhere. Based on its review, the PRC creates a "Disapproved Publications List," a compilation of those publications which violate DOP 852 and should not be permitted into the prison. That list is updated monthly after the PRC's monthly review, DOP 852 VII.A., and is circulated to the personnel in the correctional facilities who are charged with enforcing DOP 852.

Hodges received *Gallery* through May 1992 and the July and August 1992 issues as well, (Tr. 15-16), and Flora received the May, July, and August 1992 issues. (Tr. at 23). KMCC had forwarded *Gallery*'s February, March, April, and May 1992 issues to the PRC for further review, but the PRC approved those issues for dissemination to the inmates. Apparently, with respect to these issues, the PRC only reviewed *Gallery*'s pictorial content, which, alone, did not violate DOP 852.[4] (Tr. at 160, 168, 202-03). It was not until the June 1992 issue that KMCC objected to

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[3] The PRC meets monthly and consists of five members who are appointed by the Deputy Director of the VDOC.

[4] KMCC had objected only to the pictorial content of these issues.

Gallery's written content. Upon review of this issue, the PRC concluded that the written material violated DOP 852 and disapproved its dissemination. The July 1992 issue was never forwarded to the PRC for review and was consequently permitted into the prison. (Tr. at 164). KMCC objected again to the written material in the August 1992 issue, but the PRC, after its review, approved the issue for entry. (Tr. at 166). After this suit was filed, the PRC examined the July 1992 issue and reexamined the August 1992 issue and concluded that they violate DOP 852. (Tr. at 165-66). Since September 1992, the PRC has consistently disapproved *Gallery* magazine each month for dissemination based on the DOP 852 criteria.

The focus of this dispute has not been on *Gallery*'s pictorial content, but on its written material. *Gallery*'s pictures are of women, posing alone in the nude in different settings. They do not violate DOP 852. *Gallery*'s written material, on the other hand, is unlike its pictures in that it describes actual sexual intercourse. For example, the "Feedback" section of the June 1992 issue included letters allegedly from four readers. In three of the letters, the male authors vividly described actual sexual episodes with females, providing graphic detail about penetration, positioning, and their physical and vocal responses. *Feedback*, Gallery, June 1992, at 10-12, 92-93, 100. In the fourth article, the male described having sex with his wife's best friend. At the conclusion of the encounter, the male learned that his wife had been watching with approval and subsequently joined the two of them for more sexual activity. *Id.* at 12. The focus of this opinion is therefore on

the constitutionality of DOP 852 and its use in excluding *Gallery* based on its written content.

II. Introduction

Once it was thought that "the place which society has assigned for repentance, ought to present no scenes of pleasure and debauch." Lawrence M. Friedman, *A History of American Law* 297 (1985) (quoting Alexis de Tocqueville and Gustave de Beaumont, *On the Penitentiary System in the United States and Its Application to France* (1833)). The penal system of today, however, little resembles that of yesteryear.[5] Reforms have slowly extended to prisoners rights that heretofore were uncommon in the traditional prison environment. But despite the wave of changes, inmates do not, nor should they ever, enjoy the same freedom and privileges that those who choose to obey the law enjoy. Prisons are built to punish the criminally deviant, to protect society, and to effectuate some sort of internal change in the inmates so that when they are released they will not soon return. For prisons to serve those purposes, " 'lawful incarceration [must] bring[ ] about the necessary withdrawal or limitation of many privileges and rights.' " *Vester v. Rogers*, 795 F.2d 1179,

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[5] Charles Dickens once lamented the penal nature of prison life when he wrote, "Over the head and face of every prisoner who comes into this melancholy house, a black hood is drawn; and in this dark shroud . . . he is led to the cell. . . . He is a man buried alive." Lawrence M. Friedman, *A History of American Law* 297 (1985) (quoting Charles Dickens, *American Notes* 118, 121 (1842)). Much has changed since the days Charles Dickens satirized the life and times of prisoner life.

1182 (4th Cir. 1986), *cert. denied*, 482 U.S. 916 (1987) (quoting *Price v. Johnson*, 334 U.S. 266, 285 (1948)).

This court must decide whether the Commonwealth may restrict an inmate's access to sexually explicit material. In doing so, this court will determine whether the regulation at issue is reasonable in its substantive and procedural due process aspects. This opinion will focus first on the constitutional standard that regulations of this sort must satisfy and whether DOP 852 in particular satisfies that standard, and will then address whether the minimum procedural safeguards are in place to protect adequately the rights of those who have a legitimate interest in communicating with prisoners.

III. Prison Regulations and The Standard of Review

In 1989, the Supreme Court decided the standard of review for regulations that affect "the sending of a publication . . . to a prisoner." *Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989). The regulation the Court faced in *Abbott* excluded publications that were considered detrimental to "the security, good order, or discipline of the institution,"[6] including sexually explicit material that involved homosexuality, sado-masochism, bestiality, and children. *Id.* at 404, 405 n. 6 (footnote added). In deciding what constitutional standard to apply, the Court had two options. It could have adopted its reasoning in *Procunier*

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[6] The regulation provided procedural safeguards to the publisher and inmate by requiring the warden to notify both when a publication was excluded.

v. Martinez, 416 U.S. 396 (1974), which required regulations to pass a heightened scrutiny, or its more recent analysis in *Turner v. Safley*, 482 U.S. 78, 89 (1987), which adopted a reasonableness test.

Specifically, *Martinez* required regulations to "further an important or substantial governmental interest," such as security, order, or rehabilitation, and be "generally necessary" to protect one or more of those interests. *Martinez*, 416 U.S. at 413-14. *Turner*, on the other hand, required the regulations to be only "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. Four factors guide the *Turner* analysis.

1. Whether the regulation is neutral and reasonably related to a legitimate governmental interest;

2. Whether alternative means are available to the inmate to exercise the asserted right in question;

3. Whether accommodating that right will have a significant ripple effect on fellow inmates, prison staff and prison personnel; and

4. Whether the alternatives available suggest that the status quo is actually an exaggerated response to prison concerns.

Abbott, 490 U.S. at 414-19; *Turner*, 482 U.S. at 89-91. The Court settled the emerging controversy by adopting *Turner's* reasonableness standard in determining the constitutionality of regulations restricting the entry of publications into prisons.

An underlying theme of the *Turner* analysis is the deference afforded to the expert judgment of those who are responsible for managing prisons. *See generally Bell v. Wolfish*, 441 U.S. 520 (1979) (upheld the "publisher-only" rule which prohibited inmates from receiving hard-cover books that are not mailed directly from publishers, book clubs, or bookstores because of perceived security risks); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) (the Court accepted the expert judgment of prison officials who determined that Union bulk-mailings posed a greater risk to security than did bulk-mailings from other organizations and, thus, permitted the proscription of Union bulk-mailings). Deference is necessary because "the problems of prisons in America are complex and intractable[ ] and . . . are not readily susceptible of resolution by decree." *Martinez*, 416 U.S. at 404-05. As a consequence, "the courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Id.* at 405 (footnote omitted). This does not require the courts to trust blindly the judgment of prison officials. Instead, it forces prison officials to make reasonable judgments regarding how they manage prison life.

IV. The Facial Challenge to the Regulation

The first Turner factor requires the regulation to be neutral and reasonably related to a legitimate governmental objective. *Abbott*, 490 U.S. at 414. The expressed interest furthered by DOP 852 is "security, discipline, and good order of the facility." DOP 852 IV. The Commonwealth also contends DOP 852 furthers the interest of

"public safety" which includes rehabilitation.[7] These are without dispute legitimate penological interests. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987); *Martinez*, 416 U.S. at 412; *Pell v. Procunier*, 417 U.S. 817, 822-23 (1974). Thus, the analysis of this first factor focuses only on whether the regulation is in fact neutral in regards to the content of expression and reasonably related to the proffered penological interests.

Plaintiffs first argue that the regulation is not neutral because its definition of obscenity is so broad that it "encourages arbitrary and capricious enforcement, based upon personal prejudices and opinions" and, thus, poses the same problems as the regulation in *Martinez*. (Montcalm's Pre-trial Brief at 12). They also contend that the court should read the regulation as incorporating the *Miller v. California*, 413 U.S. 15 (1973), definition of obscenity because the term "obscenity" appears in DOP 852 VIII.D., and it should be read in light of its "tradition of specific legal significance." (Montcalm's Post-trial Brief at 8 n. 3).

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[7] Edward C. Morris, the Deputy Director of VDOC, testified that "[t]he presence of these materials in the prison environment undermines our mission, which is public safety. Public safety many people tend to think of, as preventing escape, but it is really much broader and more complicated than that. Our mission is to protect the public by controlling prisoners who are confined in a prison system and offering them opportunities to be rehabilitated while they are in our custody, and the presence of the type of materials that we are attempting to regulate make it difficult for us to accomplish that mission." (Tr. at 53).

This court does not find plaintiffs' analogy to *Martinez* persuasive given the differences between the regulations in each case. The regulation at issue in *Martinez* was by its very nature ambiguous, and any meaningful enforcement necessarily required subjective judgments by those prison officials who determined its applicability.[8] DOP 852 VIII.D., on the other hand, requires material to satisfy two criteria. The first focuses specifically on sexual conduct and activity not on what prison personnel find to be personally offensive. The standard is objective and unambiguous. The second prong requires that a "reasonable person . . . find . . . the material taken as a whole [to] appeal[ ] to a prurient interest in sex." DOP 852 VIII.D.2. This does not amount to vesting unbridled discretion in prison personnel because the second prong of the regulation cannot be read without the first.[9] Thus,

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[8] The regulation in *Martinez* allowed officials to exclude inmate correspondence that "unduly complain[ed]," "magnif[ied] grievances," "express[ed] inflammatory political, racial, religious or other views or beliefs," or contained matter deemed "lewd, obscene . . . defamatory" or "otherwise inappropriate." *Martinez*, 416 U.S. at 399-400.

[9] The two criteria must be read in tandem. As an example, Hodges introduced at trial *Firefly*, by Piers Anthony, a book he claims he checked out of the prison library. In one part of the book, a small child describes a sexual encounter she had with an older man. The description seems to violate the first prong of DOP 852 VIII.D. as it describes an act of sexual intercourse. However, the material, taken as a whole, must also appeal to a prurient interest in sex before it will violate DOP 852. It clearly does not violate this second prong as this description is but a small part of the entire story. In fact, the description takes place during the course of a criminal trial to punish the older man who engaged in sexual intercourse with the child.

DOP 852's clarity distinguishes it from the regulation the Court faced in *Martinez*, and does not pose the same type of enforcement problems that concerned the Court in that case.

DOP 852 is also neutral with respect to the content of the publications it excludes. Regulations may distinguish among publications so long as such distinctions are based on the potential impact the publications may have on legitimate penological interests.[10] *Abbott*, 490 U.S. at 415; *Jones*, 433 U.S. at 132. In this case, VDOC has done just that. It distinguishes among publications based on their potential impact on order within the prison and on the potential adverse effect they may have on inmate rehabilitation. KMCC personnel may not exclude a publication simply because it offends their personal sensibilities. Thus, while content is certainly considered, the regulation is still neutral "in the technical sense." *Abbott*, 490 U.S. at 416.

Plaintiffs cite the lack of empirical evidence linking the possession of *Gallery* magazine to disruptive sexual behavior or to unsuccessful rehabilitation efforts as evidence of the regulation's unreasonableness. This lack of proof, claim the plaintiffs, vividly illustrates the point that the stated penological interests are not furthered by the magazine's exclusion.[11] Prison regulations, however,

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[10] In fact, the Court in *Abbott* stated that "[w]here . . . prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security, the regulations are 'neutral' in the technical sense in which we meant and used that term in *Turner*." *Abbott*, 490 U.S. at 415-16.

[11] The Commonwealth also justifies its exclusion of certain sexually explicit publications because such material is more

need not necessarily be substantiated by empirical evidence to comply with the Constitution. Often times, prison officials are unable to demonstrate an actual causal connection between the challenged regulation and its purpose, but that is precisely why prison officials are given discretion to anticipate problems before they occur. *See U.S. v. Stotts*, 925 F.2d 83, 87 (4th Cir. 1991) ("We will not require that an actual breach of security occur before upholding regulations designed to prevent it."); *Espinoza v. Wilson*, 814 F.2d 1093, 1099 (6th Cir. 1987) ("[A]n actual danger need not be demonstrated, it is enough to show that a potential danger exists."). In fact, "it is rational . . . to exclude materials that, although not necessarily 'likely' to lead to violence, are determined by the warden to create an intolerable risk of disorder under the conditions of a particular prison at a particular time." *Abbott*, 490 U.S. at 416 (footnote omitted). Thus, the absence of empirical evidence in this case does not vanquish the regulation.

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valued in the inmate population than other items and, consequently, could pose a threat to prison order. The plaintiffs claim that the regulation cannot be reasonably based on this justification because prison officials allow countless other items into the prison which may not be sexually explicit but are nevertheless highly valued. If it is the value itself that poses the threat to order, then, according to the plaintiffs, prison officials should exclude all items that possess value to the inmates. Such an exclusion, however, would clearly be an exaggerated response to the penological interests involved. (Montcalm's Pretrial Brief at 15, 16). The court need not address the merits of this argument because it finds the regulation reasonably related to the penological interest in rehabilitation.

In determining whether the relationship between the regulation and the stated penological interest is reasonable, the underlying basis for the regulation must be examined. The Commonwealth established through testimony from VDOC's Deputy Director, who is one of the officials responsible for prison operation, that a chief concern of VDOC is not only to punish criminals for their past conduct, but also to rehabilitate them. The Deputy Director testified that an important step in the rehabilitation process is to have the inmates convicted of sexual offenses view the incident from the victim's perspective, to see the pain the inmate caused, and more importantly, to instill some respect for members of the opposite sex.[12] Placing such material in the hands of those who have

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[12] The Deputy Director testified that "permitting access to those kinds of materials undermines that very effort [of rehabilitation], and particularly with respect to the 20 percent or so of our inmates who are sex offenders. . . .

"The treatment of sex offenders is, obviously, a very difficult area, [it] . . . is basically treating him to control that behavior, and a good part of the energy in treating a sex offender is getting them [sic] to empathize with the victim and to understand the impact that abuse, their [sic] sexual abuse of the victim has on that person. [The material barred by DOP 852] portray[s] the victim . . . as somebody who wants it, who desires it. They build on those fantasies that . . . this is normal, acceptable behavior, and I don't know how we would be expected to rehabilitate or treat people if, on the one hand, we are trying to get them to empathize with the victims and on this other hand we are giving them materials that continue to portray their victims as willing participants who actually want to be raped and sodomized. . . . Whether violence or force is a part of it, I think it demeans victims . . . and does not enable the sex offender to reach a true understanding of the impact that his abuse has on the people he victimizes in society." (Tr. at 57-60).

already demonstrated a lack of control in this area would only reinforce the attitudes that led to their deviant behavior in the first place. (Tr. at 59). Thus, in the Deputy Director's judgment, this type of material significantly hinders the rehabilitation process.

The Deputy Director's diagnosis of the problem such material poses to inmates is not in any way novel. In *Dawson v. Scurr*, 986 F.2d 257, 262 (8th Cir. 1993), *cert. denied sub nom. Shearon v. Lynch*, 114 S.Ct. 232 (1993), the court stated that "[a]llowing . . . publications [that depict nudity] into individual cells, where they would likely be disseminated to other inmates, would substantially interfere with defendants' rehabilitation and security objectives." *Id.*; *See also Espinoza*, 814 F.2d at 1098-99 (upheld a regulation that prohibited entry of certain homosexual publications because, in the expert judgment of the Warden, such material posed dangers to the prison environment). This type of judgment by prison personnel has been accorded deference by the courts in the past, and this court finds no reason why their judgment in this instance should not be accorded similar deference. *Accord Abbott*, 490 U.S. 401; *Turner*, 482 U.S. 78; *Bell*, 441 U.S. 520; *Jones*, 433 U.S. 119; *Pittman v. Hutto*, 594 F.2d 407, 411 (4th Cir. 1979) ("Significantly for our purpose, the Court made clear that prison officials may limit first amendment rights, whether of speech or association, whenever they reasonably conclude that the exercise of such rights possesses the likelihood of disruption of prison order or stability or otherwise interferes with the penological objectives of the institution."). Because the material

excluded under DOP 852 significantly hinders the rehabilitation process, this court finds a reasonable relationship between the penological interest and DOP 852.

As to plaintiffs' second argument, this court remains unpersuaded that the term "obscenity" must be read in light of *Miller*. Although DOP 852 VIII.D. states that a publication may be refused on "grounds of obscenity," it defines exactly what it means by that. It makes no reference to *Miller*'s standard of obscenity, and this court finds it unnecessary to read into the regulation that which is not supported by the regulation's plain language. The question still remains, though, whether the regulation's definition of obscenity must incorporate *Miller* to comply with the Constitution.[13] To answer this question, a closer scrutiny of the environment and the audience is necessary.[14] This court need only mention that there are stark

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[13] Plaintiffs and the Commonwealth cite *Donald v. Spann*, No. 84-0088-H (4th Cir. Oct. 10, 1984) and *Spaulding v. West*, No. 796473 (4th Cir. Jan. 2, 1980) to support their positions. This court finds both these cases to provide very little insight into the relationship between *Miller* and *Turner*. The regulations at issue in those cases incorporated the *Miller* standard. Thus, they did not address whether *Miller* was a vital and necessary aspect of the regulations.

[14] It is not uncommon for the Court to consider the audience involved to determine whether it is permissible to regulate the speech in question. For example, in *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court permitted an adjustment to the definition of obscenity where children are involved because "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults. . . . " *Id.* at 638 (quoting *Prince v. Mass.*, 321 U.S. 158, 171 (1944)). Thus, it is not inconsistent with First Amendment jurisprudence to consider the prison environment and the audience involved

differences between the prison environment and the outside world. In the prison environment, the state is extensively involved in the management of the everyday affairs of the inmates. It is responsible for maintaining order and security, and rehabilitating the inmates. Thus, the responsibility the state assumes in a prison is unlike its responsibility in society in general. The audience is also significantly different. The Deputy Director testified that "[w]e are not talking about people on the street here, but a confined population, male felons, in this case, the majority of whom are committed for violent offenses, and who, characteristically, want what they want immediately, and who often use violence as a means to achieve their ends."[15] (Tr. at 63). These differences in the environment and audience mandate a different standard. Thus, non-obscene sexually explicit material (e.g., material that

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when examining the extent of a prisoner's First Amendment rights. Other courts have agreed that "[t]he first amendment rights of the prisoners cannot be evaluated without reference to that environment and to the type of audience it involves." *Guajardo v. Estelle*, 580 F.2d 748, 762 (5th Cir. 1978).

[15] The Deputy Director testified further that "when you have a confined population without normal heterosexual contact, it would seem to me there would certainly have to be a certain amount of tension and frustration present in that environment, and we have cases each year where inmates are sexually assaulted. . . . [G]iven the population that we are talking about, that a person who has constant exposure to this kind of material and who may have a disposition to acting violently and seeking immediate gratification, that the presence of that material is going to make our job more difficult in preventing sexual assaults and providing for the safety of the inmates. . . . " (Tr. at 63-4).

does not violate *Miller*), the dissemination of which cannot be limited in society, may be excluded from the prison environment given the appropriate justifications.[16] *See Guajardo*, 580 F.2d at 762; *Thompson v. Patteson*, 985 F.2d 202, 205 (5th Cir. 1993).

The second *Turner* factor is "whether there are alternative means of exercising the right that remain open to prison inmates." *Abbott*, 490 U.S. at 417 (quoting *Turner*, 482 U.S. at 90). "The right" is not to be read narrowly, but "sensibly and expansively." *Id.* at 417. For example, in *Pell*, 417 U.S. 817, the progenitor of this factor, the Court upheld a regulation that prohibited face-to-face interviews between inmates and the media because alternative means of communication were available to the inmate to communicate with the outside world. The Court focused on whether the regulations at issue precluded all manner of exercising the asserted right. Because the inmates could visit with family, clergy, attorneys, and write to media representatives, the Court found no constitutional problem with that policy of exclusion. *Pell*, 417 U.S. at 824-25; *See also O'Lone*, 482 U.S. 342 (upheld a regulation that limited the time Muslim inmates could attend their religious services because the regulation did not proscribe in toto inmates practicing their religious beliefs).

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[16] The plaintiffs argue that *Miller* is at least relevant to the *Turner* analysis. However, the sole inquiry is the reasonableness of the regulations, and *Turner* and *Abbott* have given the court the relevant factors in making that determination. This point is really not seriously contested. Montcalm has conceded that VDOC may exclude material that does not violate *Miller*, (Tr. at 213), but continues to argue that the court should at least consider the factors outlined in *Miller* in examining DOP 852.

In *Abbott*, this factor was satisfied because "the regulations at issue . . . permit[ed] a broad range of publications to be sent, received, and read. . . . " *Abbott*, 490 U.S. at 418. The same is true in this case. DOP 852 does not, as the plaintiffs contend, "totally deprive[ ] inmates of their right to receive legally non-obscene, sexually-oriented publications." (Montcalm's Pre-trial Brief at 21). On the contrary, the range of sexually explicit material excluded by DOP 852 is quite limited. Inmates can still regularly receive other sexually explicit publications that do not violate DOP 852. Thus, as in *Abbott*, this factor is clearly satisfied because alternative means are available to the inmates to receive other sexually explicit publications.[17]

The third *Turner* factor addresses the "impact that accommodation of the asserted constitutional right will have on others (guards and inmates) in the prison." *Abbott*, 490 U.S. at 418. Plaintiffs contend that accommodation will have "no adverse impact because the VDOC already has procedural mechanisms in place for reviewing and distributing incoming publications to inmates," and that accommodation would reduce "the natural animosity engendered by the censorship process."[18] (Montcalm's Pre-trial Brief at 21-22). While

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[17] The court does not intimate that inmates must receive at least some sexually explicit material for this factor to be satisfied. It makes no ruling whether VDOC could ban *all* sexually explicit material.

[18] The animosity engendered by the censorship process is not a concern to this court. The focus of the court's inquiry is not how regulations affect inmates' attitudes regarding legitimate censorship, but whether the regulations are reasonably related to a legitimate purpose.

accommodation may not have an adverse impact on the use of prison resources, a "significant 'ripple effect' on fellow inmates" is a distinct possibility because of the frequency that bartering occurs among the inmates.[19] *See also Dawson*, 986 F.2d at 262. As a consequence, accommodation would adversely affect the rehabilitation process.

Finally, "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns. . . . [I]f an inmate claimant can point to an alterative [sic] that fully accommodates the prisoner's rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Abbott*, 490 U.S. at 418 (quoting *Turner*, 482 U.S. at 90-91).

Plaintiffs have proposed an alternative policy in which the publishers send their publications directly to the PRC which then decides which ones violate DOP 852. (Tr. at 107). This would, by removing the initial review by the postal clerks at each correctional facility, result in greater uniformity in the application of DOP 852 because only one group would be applying the regulation. While this alternative may lead to more uniform results, it also carries with it greater burdens on the PRC and potentially more expense than the current system. The Deputy Director described the proposal as not practical given the

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[19] The Deputy Director acknowledged that bartering occurs within the system notwithstanding regulations to the contrary.

volume of publications reviewed by the postal clerks.[20] (Tr. at 107). The court agrees that this proposal is not an "obvious, easy alternative[ ]" to the current system. *Abbott*, 490 U.S. at 418 (quoting *Turner*, 482 U.S. at 90). Moreover, no evidence has been presented of any other alternatives, leaving this court to conclude that the current review system is constitutional.

At the root of this conclusion is the deference the court affords decisions that affect the management of the prison. "Deference requires that courts not second-guess a prison administrator's choice among alternative policies unless an alternative exists that would meaningfully enhance an inmate's ability to exercise his constitutional rights." *Hause v. Vaught*, 993 F.2d 1079, 1083 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 702 (1994). Plaintiffs' proposal does not "meaningfully enhance" an inmate's ability to exercise his rights. It would impose an enormous burden on a part-time committee to achieve only greater uniformity in the publications excluded. The proposal would have no impact on an inmate's ability to exercise his rights. It should also be noted that "[w]ithout some evidence regarding the extent to which the proffered alternative would enhance an inmate's ability to exercise his constitutional rights, this court will not second-guess prison officials' regulatory choices." *Id.* at 1083.

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[20] Between 100 and 150 publications are reviewed by KMCC personnel daily. (Tr. at 188).

V. DOP 852 is Constitutional as Applied

First of all, there can be no dispute that the written material found in *Gallery* runs afoul of both prongs of DOP 852 VIII.D. The letters in the "Feedback" section of each issue undoubtedly satisfy the first prong of DOP 852 because they all describe graphically sexual intercourse. The second prong is also met because a reasonable person when viewing the material as a whole would ostensibly conclude that it appeals to a prurient interest in sex. All of the disputed publications in this case fall squarely within DOP 852's ambit.

Plaintiffs do not argue that *Gallery* does not violate DOP 852. Instead, they focus on the manner in which it has been applied, contending that its application has been arbitrary and capricious. To support this contention, they point to the postal clerks who as the initial screeners of all the publications that enter the system receive little if any formal training other than receiving a copy of the regulation itself. This, they contend, results in a haphazard manner of enforcement with inconsistent results month-to-month within the particular institution and statewide. This arbitrariness, according to the plaintiffs, is not remedied by the PRC's review because it has admitted and excluded indistinguishable issues of *Gallery*.

The current review process has been inconsistent in the application of DOP 852 to *Gallery*. Before June 1992, only one issue of *Gallery* was ever excluded, notwithstanding its written material. Even after the PRC excluded the June 1992 issue based on its written material, the postal clerks at KMCC permitted the July 1992

issue into the institution. Moreover, the PRC, after reviewing the August 1992 issue's written material, approved the issue for dissemination, which was concededly inappropriate.

These inconsistencies, however, do not render the process arbitrary and capricious. "[W]hat may appear to be inconsistent results are not necessarily signs of arbitrariness or irrationality." *Abbott*, 490 U.S. at 417 n.15. First, the PRC has been consistent in excluding *Gallery* since September 1992. Second, even though the PRC actually approved the August 1992 after reviewing the written material, a PRC member testified that the issue's initial approval was improper. The July 1992 issue, which was never forwarded to the PRC, and the August 1992 issue were subsequently disapproved by the PRC after this suit was filed. Moreover, the approval of the August 1992 issue is quite an anomaly in the history of the *PRC*'s application of DOP 852, at least with respect to *Gallery*. Prior to June 1992, the PRC evaluated *Gallery*'s pictorial content, and correctly concluded that based solely on its pictures, *Gallery* did not violate DOP 852. Plaintiffs and defendants agree with this assessment of *Gallery*'s photographs. This court is of the opinion that these inconsistencies do not make the system arbitrary and capricious. To rule so would be to mandate perfection, something that cannot be created by judicial fiat.

VI. Minimum Procedural Safeguards

In examining the procedural requirements for prison regulations, *Martinez* is the starting point. *Martinez* is best

understood if it is bifurcated into substantive and procedural due process aspects. *See Parker v. McKenzie*, No. 76-2083, slip op. at 3 (4th Cir. May 1, 1978) ("[*Martinez*] has two aspects: one substantive and the other procedural."). Substantively, it implemented a heightened scrutiny test for prison regulations. Procedurally, it established "minimum procedural safeguards" for those with a legitimate interest in communicating with inmates.[21] *Martinez*, 416 U.S. at 417. These procedural safeguard requirements included "appropriate notice, a reasonable opportunity to challenge the initial determination, and an ultimate decision by a disinterested third party." *Parker*, No. 76-2083, slip op. at 3; *Martinez*, 416 U.S. at 418-19. Other courts have followed *Martinez* and similarly required such procedural protection. *See Smith v. Donohue*, 977 F.2d 585, 1992 WL 238340 at *4 (7th Cir. Sept. 24, 1992) ("In [*Martinez*], overruled on other grounds by [*Abbott*], the Supreme Court stated that the decision to censor inmate mail must be accompanied by minimum procedural safeguards, including notice of censorship to the sender and recipient of the mail, and an opportunity to protest to an official other than the censor."); *Martin v. Kelley*, 803 F.2d 236, 243-44 (6th Cir. 1986); *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1027-28 (2d Cir. 1985); *Trudeau v. Wyrick*, 713 F.2d 1360, 1366-67 (8th Cir. 1983) ("[T]he Warden's duty under [*Martinez*] was to give some form of

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[21] "In this case, there is no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners." *Abbott*, 490 U.S. at 408. As a consequence, they are entitled to "minimum procedural safeguards." *Martinez*, 416 U.S. at 417.

notice to the author and to the intended recipient that delivery of the letter was being upheld, and then refer the question to an impartial third party for resolution."); *Parker*, No. 76-2083, slip op. at 3; *Cofone v. Manson*, 409 F.Supp. 1033, 1041-42 (D.Conn. 1976) (holding a regulation defective because it provided notice only to the inmate and not the publisher). Although *Abbott* overruled *Martinez'* substantive aspect, it did not address its procedural holding because the regulation in *Abbott* already "provide[d] procedural safeguards for both the recipient and the sender.[22] *Abbott*, 490 U.S. at 406. Thus, *Martinez'* procedural holding escaped *Abbott* unscathed and still protects those with a legitimate interest in communicating with inmates.

In this case, while the regulation adequately protects the interests of the inmates,[23] specifically Hodges and Flora, it does not afford any procedural safeguards to protect the interests of publishers such as Montcalm.

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[22] The regulations in *Abbott* required the warden to advise the inmate in writing of the specific reasons for the rejection, 28 C.F.R. § 540.71(d) and provide the publisher a copy of the rejection letter, 28 C.F.R. § 540.71(e). An independent review is also available upon request by the publisher. 28 C.F.R. § 540.71(e).

[23] DOP 852 VII. provides notice to the inmate and allows the inmate to appeal through the "Inmate Grievance Procedure" the decision by either the warden or the PRC to exclude a publication. Both Hodges and Flora were notified that KMCC intended to exclude their respective issues of *Gallery* for the months mentioned. Although one inmate supposedly received notice after the time prescribed by the regulation, this did not amount to any prejudice.

Publishers have no way of knowing when their publications have been banned from the prison. It was completely fortuitous that Montcalm learned of KMCC's decision to exclude *Gallery*. Flora wrote Montcalm, requesting a refund because KMCC refused to permit him to receive his subscription. Because DOP 852 fails to comply with *Martinez'* procedural requirements, as adopted by the Fourth Circuit, it is facially defective procedurally.

It should be noted that compliance with the procedural requirements will not entail a great burden for VDOC. In fact, the Constitution may require nothing more than VDOC sending the publisher a copy of the letter it sends to the inmate detailing on what basis the publication is being excluded and providing the publisher an opportunity to respond in writing. This is hardly an "unduly burdensome" requirement. *Martinez*, 416 U.S. at 419.

The Commonwealth contends that granting declaratory or injunctive relief on this issue is unnecessary because the relief would serve no real purpose. (Commonwealth's Post-Trial Brief at 19). Montcalm already has notice that its publications violated DOP 852 and that *Gallery* will not be approved for future dissemination until its material is "toned down." *Id.* at 20. In response to these contentions, the court need only turn to the review process itself, which belies the Commonwealth's position. The PRC conducts monthly evaluations of publications to which the individual institutions have objected. The PRC then determines whether that monthly issue violates DOP 852. It makes no judgment about future issues. Indeed, DOP 852 VII.A. states that "each facility will approve or

disapprove publications for receipt by inmates on a *case-by-case* and/or *issue-by-issue* basis. . . . " (emphasis added). That is why issues from publishers that have previously appeared on the cumulative list of disapproved publications are reviewed by the PRC again and again. For this reason, the Commonwealth's position is untenable, especially in light of the procedures outlined in DOP 852 VII.A.

VII. Recommended Findings of Fact

1. Donald Hodges and Michael Flora, inmates in the VDOC penal system, subscribed to *Gallery* magazine, a sexually explicit publication which describes graphically coitus, fellatio and cunnilingus.

2. DOP 852 authorizes the exclusion of publications that depict sexual conduct in such a way as to include, *inter alia*, descriptions of sexual intercourse, or lewd exhibitions of uncovered genitals in the context of masturbation or other sexual activity, and that, taken as a whole, appeal to a prurient interest in sex as viewed by a reasonable person.

3. KMCC personnel conduct an initial inspection of publications that are sent to the institution to verify their compliance with DOP 852.

4. Once KMCC determines a publication violates DOP 852, it informs the inmate of the publication and the guidelines that are believed to be violated. It then forwards the publication to the PRC in Richmond, Virginia.

5. The PRC reviews the publications sent by the institutions and makes the final determination whether they violate DOP 852.

6. The PRC also creates a "Disapproved Publications List," a cumulative listing of the publications reviewed and disapproved for dissemination. Once an issue appears on the list, the institutions are not to disseminate it to the inmates.

7. KMCC objected to the February, March, April, and May, 1992 issues of *Gallery* based on their pictorial content. The PRC subsequently determined that these issues did not violate DOP 852.

8. KMCC objected to the *Gallery*'s written material in the June and September 1992 issues. The PRC subsequently disapproved these issues for dissemination to the inmates.

9. Although the July 1992 issue was never forwarded to the PRC and was, as a consequence, allowed into the prison, the PRC subsequently examined the issue and found it to violate DOP 852.

10. Although the PRC initially approved the August 1992 issue based on its written material, it subsequently retracted its approval, finding that the issue violated DOP 852.

11. The PRC has consistently disapproved *Gallery* since September 1992 based on the criteria outlined in DOP 852 VIII.D.

12. Minimum procedural safeguards have been provided to the inmates.

13. These safeguards, however, have not been provided to publishers whose publications have been excluded.

VIII. Recommended Conclusions of Law

1. Prison regulations affecting the dissemination of publications to inmates must be reasonably related to a legitimate penological interest. *Turner v. Safley*, 482 U.S. 78 (1987)

2. Security, order, and rehabilitation are legitimate penological interests which are furthered by DOP 852.

3. The written material in all *Gallery* issues presented to this court violate both prongs of DOP 852 VIII.D.

4. The articles' vivid descriptions of sexual intercourse violate the first prong of DOP 852 VIII.D.

5. A reasonable person viewing the material as a whole would conclude that it appeals to a prurient interest in sex.

6. *Turner* provides four factors that aid in the determination of a particular regulation's reasonableness.

7. DOP 852 satisfies the first *Turner* factor as it is neutral with respect to the content of expression and reasonably related to the penological interest in rehabilitation.

8. The regulation the Court faced in *Procunier v. Martinez*, 416 U.S. 396 (1974), is not analogous to the

regulation before this court because it permitted personnel to inject their own personal prejudices, creating obvious enforcement problems.

9. DOP 852, on the other hand, is unlike the regulation in *Martinez* as it is objective, unambiguous and does not pose the same type of enforcement problems the Court faced in *Martinez*.

10. Regulations may distinguish among publications so long as such distinctions are based on the potential impact the publications may have on legitimate penological interests.

11. DOP 852 is neutral with respect to the content of the publications it excludes because it distinguishes among publications based on their potential impact on security, order and rehabilitation.

12. A lack of empirical evidence substantiating a causal connection between excluding *Gallery* publications and security, order or successful rehabilitation is not necessary.

13. Prison officials are given discretion to anticipate problems of this nature before they occur. *U.S. v. Stotts*, 925 F.2d 83, 87 (4th Cir. 1991).

14. The Deputy Director's judgment that *Gallery* and other publications that violate DOP 852 significantly hinder inmate rehabilitation is afforded deference.

15. The term "obscenity," as it appears in DOP 852 VIII.D., should not be read in light of its definition in *Miller v. California*, 413 U.S. 15 (1973) as its meaning is clear from the regulation itself.

16. Furthermore, the regulation need not incorporate the *Miller* definition of obscenity to comply with the Constitution as the prison environment and the audience involved mandate a different standard to be applied.

17. Regulations may exclude sexually explicit publications that are not "obscene" within *Miller.*

18. The second *Turner* factor is also satisfied as the inmates may receive other sexually explicit publications. DOP 852 excludes only a very narrow group of sexually oriented publications.

19. The third *Turner* factor, the effect accommodation would have on others in the prison, is met because allowing such publications into the prison may adversely impact the rehabilitation process of certain inmates. Accommodation is not necessary.

20. The final *Turner* factor requires an examination of other alternatives to determine whether the current system of review is an exaggerated response.

21. The alternative policy proposed, requiring publishers to send their publications directly to the PRC, is not an "obvious, easy alternative." *Abbott*, 490 U.S. at 418 (quoting *Turner*, 482 U.S. at 90-91). The proposal does not satisfy the final factor in the *Turner* analysis, nor does it meaningfully enhance an inmate's ability to exercise his constitutional rights.

22. DOP 852 is facially constitutional as it is reasonably related to legitimate penological interests.

23. DOP 852 has not been applied arbitrarily or capriciously.

24. Although the current system has produced inconsistent results in the review of *Gallery*, such inconsistencies do not render the review process arbitrary and capricious.

25. *Martinez* mandates that minimum procedural safeguards be afforded those with a legitimate interest in communicating with inmates. This aspect of *Martinez* has not been overruled by *Abbott*.

26. The minimum safeguards are notice to the publisher, an opportunity for the publisher to protest an adverse determination, and a disinterested party review of the original decision to exclude the publication.

27. DOP 852 is facially defective procedurally and as applied. It must afford minimum procedural safeguards to publishers such as Montcalm.

28. The review process itself which requires each issue of a publication to be evaluated makes declaratory and injunctive relief appropriate to Montcalm under these circumstances.

IX. Recommended Disposition

This court finds DOP 852 to be substantively reasonable, on its face and as applied, but procedurally defective, on its face and as applied, with respect to publishers' due process rights. It recommends judgment be entered accordingly, and injunctive relief be granted, requiring VDOC to provide procedural safeguards as outlined in this report.

Notice to Parties:

Notice is hereby given to the parties of the provisions of 28 U.S.C. Section 636(b)(1)(C):

> Within ten days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to file timely written objections to these proposed findings and recommendations within ten days could waive appellate review. At the conclusion of the ten-day period, the Clerk is directed to transmit the record in this matter to the Honorable Samuel G. Wilson, United States District Judge.

The Clerk is also directed to send certified copies of this Report of Proposed Findings of Fact, Conclusions of Law and Recommendations for Disposition to all counsel of record at this time.

DATED: This 5th day of May 1994.

/s/ Cynthia D. Kinser
United States
Magistrate Judge

A TRUE COPY, TESTE:
MORGAN E. SCOTT, JR., CLERK

BY: /s/ L. Roberts
DEPUTY CLERK

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
April 30, 1996

No. 95-6190
CA-92-907-R
CA-92-696-R

MONTCALM PUBLISHING CORPORATION

Plaintiff - Appellant

and

DONALD ARLIS HODGES; MICHAEL GLYNN FLORA

Plaintiffs

v.

R. J. BECK; J. HORTON; R. A. YOUNG; E. C. MORRIS, MS. SUMMERS; EDWARD MURRAY, in his official capacity as Director of the Department of Corrections of the Commonwealth of Virginia; JOHN DOE, 1 - 7, in their official capacities such fictitious names being designed to identify those VDOC employees whose true identities are now unknown to plaintiff-intervenor, but who serve as (a) members of the VDOC Publication Review Committee, (2) Warden or Superintendent of Keen Mountain Correctional Center (KMCC), and (3) functional KMCC mailroom censor; J. PHIPPIN, MR. BECK; COMMONWEALTH OF VIRGINIA

Defendants - Appellees

On Petition for Rehearing with suggestion for Rehearing in Banc

---

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

APPENDIX F

AMENDMENT I

[Freedom of Religion, of Speech, and of the Press]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT XIV

Section 1. [Citizenship – Due Process of law – Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

APPENDIX G

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX H

(Seal) COMMONWEALTH OF VIRGINIA
DEPARTMENT OF CORRECTIONS

DIVISION OF ADULT INSTITUTIONS
OPERATING PROCEDURE

PROCEDURE NUMBER: 852
DATE: APRIL 23, 1990
SUBJECT: INCOMING PUBLICATIONS

Part 1

GENERAL PROVISIONS

I. PURPOSE

To establish procedures to regulate the receipt and possession of publications by inmates.

II. AUTHORITY

Section 53.1 – 35 *Code of Virginia*

III. EFFECTIVE DATE: JUNE 1, 1990

IV. DISCUSSION

Inmates should be allowed to subscribe to or otherwise receive publications direct from a legitimate source so long as they are not obscene and so long as they do not pose a threat to the security, discipline, and good order of the facility.

Inmates retain certain First Amendment rights in regard to free access to publications. Correctional administrators have equally valid responsibilities under the *Code of Virginia* to maintain security,

discipline, and good order in their facilities. These responsibilities include control of contraband, control over disruptive or illegal activities, and concern for the safety and well being of inmates and institutional staff.

It is recognized that publications can have a positive rehabilitative effect on inmates. This is evidenced by Division-wide efforts to establish and support institutional libraries and law libraries for inmate use. This Division Operating Procedure establishes procedures for the receipt of publications by inmates direct from approved sources.

V. APPLICABILITY

This Operating Procedure applies to all institutions, field units, and special facilities, regarding incoming publications for inmates.

VI. DEFINITIONS

Publication

Any printed communication such as newspapers, magazines, newsletters, or any other periodicals, books, paperbacks, brochures, technical manuals, catalogs and/or pamphlets which can be subscribed to, ordered, or otherwise received direct from an approved source. Such materials, whether solicited or unsolicited by the receiving inmate, should be reviewed in accordance with the requirements of this procedure. Printed materials provided to inmates through facility approved, ongoing programs or special activities are exempt from this definition and procedure so long as they are integral to the program/activity and have been

approved by the Warden/Superintendent or his designee specifically for that program or activity.

Approved Source

Place or origin for publications received by inmates to include commercial sources such as a publisher, bookstore or book club, and not-for-profit distributors such as a religious organization or government agency.

Part II

PROCEDURES

VII. ADMINISTRATIVE PROCEDURES

A. The Warden/Superintendent of each facility will approve or disapprove publications for receipt by inmates on a case-by-case and/or issue-by-issue basis in accordance with the requirements set forth in this procedure.

B. The Warden/Superintendent of each facility will be responsible for submitting all disapproved publications and the complete Disapproved Publications Log to the Deputy Director's office once each month. (See Attachment 1)

C. The Publications Review Committee will consist of members appointed by the Deputy Director of the Division of Adult Institutions and should meet at least monthly to review all disapproved publications and materials.

D. Appeals of publications disapprovals will be handled as follows:

1. In those instances where a publication is denied by a Warden/Superintendent, the inmate may appeal this action through the Inmate Grievance Procedure. (See Section VIII: B 3).

2. In those cases where a publication is disapproved by the Publication Review Committee, the inmate may appeal through the Inmate Grievance Procedure. (See Section VIII: C 4)

VIII. OPERATIONAL PROCEDURES

A. Inmate Publication Privileges

Upon initial assignment to a correctional institution, each inmate should be informed of institutional procedures governing publications. This orientation should:

1. Make the inmate aware that it is the policy of the Division of Adult Institutions to permit inmates to subscribe to, order, or otherwise receive publications direct from an approved source so long as they are not obscene and so long as they do not pose a threat to the security, discipline and good order of the facility.

2. Make the inmate aware that he must abide by all applicable divisional, regional or institutional procedures regarding ordering, subscribing to, or otherwise receiving publications.

3. Make the inmate aware that he must secure permission from the Warden/

Superintendent prior to ordering, subscribing to, or otherwise receiving a publication in accordance with Division Operating Procedure 856.

4. Make the inmate aware that approval to receive a subscription does not include a blanket approval for each issue/edition of the publication, and that all issues/editions may be subject to review in accordance with this operating procedure.

5. Make the inmate aware that when a portion of a publication is disapproved, the entire publication will be disapproved. There will be no attempt to remove or censor the disapproved material.

6. Make the inmate aware that whenever he is transferred from one facility to another, it is the inmate's responsibility to notify the publisher of change of address. The United States Postal Service does not provide free forwarding service for materials that are not first-class mail, and therefore it is important for the inmate to change his address in a timely manner.

7. Make the inmate aware that he has the right to appeal a publication disapproval through the established Inmate Grievance Procedure.

B. Publication Approval/Disapproval

The Warden/Superintendent, or his designee, should review all publications received at the facility prior to distribution to an inmate as well as inmate requests for publications. A

determination will be made in accordance with this procedure to approve or disapprove a publication. Where a publication is disapproved, the Warden/Superintendent should:

1. Make a complete written record of the reason(s) for disapproving the publication, including specific page numbers and a notation describing the disapproved material on the Disapproved Publications Log.

2. Advise the inmate in writing of the reason(s) for disapproval within eight (8) working days of the arrival of the publication at the facility or receipt of the publication request. (See Attachment 2)

3. Inform the inmate in writing that he has the right to appeal the disapproval through the established Inmate Grievance Procedure, and that the appeal must be made within five (5) working days of the date of the disapproval notification.

C. Publication Review Committee

The Publication Review Committee's duties will include:

1. The review of any publication denials to ensure department-wide consistency in those publications disapproved for entry into facilities.

2. Compilation of a master list of disapproved publications.

3. Review of any specific publication disputes on an as-needed, case-by-case basis.

4. After reviewing the disapproved publications, the Committee will forward its decisions to the Chief of Operations who will forward the compiled list to all facilities. The Warden/Superintendent will notify the inmate of the Committee's decision (See Attachment 3). Appeals of the Committee's decision may be pursued through the Inmate Grievance Procedure. Such appeal must be made within five (5) working days; otherwise the disapproved publication will be disposed of in accordance with Division Operation Procedure 856.

D. Obscenity Criteria for Publication Disapproval

The Warden/Superintendent, or his designee, will disapprove a publication for receipt and possession by an inmate on grounds of obscenity if:

1. The publication depicts or describes sexual conduct in such a way to include, either:

   a. Representation or descriptions of actual sexual intercourse, normal or perverted, anal or oral; or,

   b. Representations or descriptions of excretion in the context of sexual activity or lewd exhibitions of uncovered genitals in the context of masturbation or other sexual activity; and

2. A reasonable person viewing the depiction or representation would find that the material taken as a whole appeals to a prurient interest in sex.

E. Other Criteria for Publication Disapproval

The Warden/Superintendent, or his/her designee, will disapprove a publication for receipt and possession by an inmate if:

1. The publication has not been subscribed to, ordered or otherwise received direct from an approved source in accordance with all applicable divisional, regional and institutional procedures.

2. The publication is unsolicited or generally mailed material whose content may be detrimental to the security, good order or discipline of the institution.

3. The publication can be reasonably documented to contain:

   a. Information regarding the manufacture or simulation of explosives, incendiaries, weapons or escape devices.

   b. Instructions regarding the ingredients and/or manufacture of poisons or drugs.

   c. Clearly inflammatory writings advocating violence, insurrection or terrorist activities against individuals, groups, organizations, the government, or any of its institutions.

   d. Instructions and/or information which may be used to alter or defeat electronic or other security devices.

   e. Instructions and/or information which may be used to alter or defeat institutional systems of communication.

f. Instructions and/or information relating to the ability to physically disable another person.

4. The publication is previously approved but makes changes in editorial or subject content which is prohibited as enumerated in item VIII, D or VIII, E, 2, a, b, c, d, e, f, as listed above.

F. Publication Possession

The Warden/Superintendent will determine a reasonable number of publications that an inmate may retain in his quarters in accordance with Division Operating Procedure 856 and institutional space, health, and safety considerations.

PART III

ADMINISTRATION

VIII. OFFICE OF PRIMARY RESPONSIBILITY

A. The Deputy Director shall hold primary responsibility for ensuring that the Publication Review Committee process is in compliance with this Operating Procedure.

B. The Warden/Superintendent shall hold primary responsibility for ensuring that institutional procedures are in compliance with this operating procedure.

IX. SUPERSESSION

This Division Operating Procedure supersedes Division Guideline 852, dated March 1, 1984.

X. REFERENCE

Operational Standards Adult Institutions, Virginia Department of Corrections, 1983, 16-9.

XI. REVIEW DATE

This Division Operating Procedure shall be reviewed and revised accordingly by June 1, 1995.

/s/ Edward C. Morris
Edward C. Morris
Deputy Director
Division of Adult Institutions

VIRGINIA DEPARTMENT OF CORRECTIONS - ADULT INSTITUTIONS
DISAPPROVED PUBLICATION LOG

DOP 852
ATTACHMENT 1

INMATE NAME NUMBER	DATE RECEIVED	PUBLICATION	VOLUME ISSUE	REASON FOR DISAPPROVAL	PAGE NUMBERS

REASONS FOR DISAPPROVAL

D.1. The publication depicts or describes sexual conduct in such a way to include either:

a. Representation or descriptions of actual sexual intercourse, normal or perverted, anal or oral; or,

b. Representations or descriptions of excretion in context of sexual activity or lewd exhibitions of uncovered genitals in the context of masturbation or other sexual activity; and

D.2. A reasonable person viewing the depiction or representation would find that the material taken as a whole appeals to a prurient interest in sex.

E.1. The publication has not been subscribed to, ordered or otherwise received direct from an approved source in accordance with all applicable divisional, regional and institutional procedures.

E.2. The publication is unsolicited or generally mailed material whose content may be detrimental to the security, good order or discipline of the institution.

E.3. The publication can be reasonably documented to contain:

a. Information regarding the manufacture or simulation of explosives, incendiaries, weapons or escape devices.

b. Instructions regarding the ingredients and/or manufacture of poisons or drugs.

c. Clearly inflammatory writings advocating violence, insurrection or terrorist activities against individuals, groups, organizations, the government, or any of its institutions.

d. Instructions and/or information which may be used to alter or defeat electronic or other security devices.

e. Instructions and/or information which may be used to alter or defeat institutional systems of communication.

E.4. The publication is previously approved but makes changes in editorial or subject content which is prohibited as enumerated in item VIII, D or VIII, E, 2, a, b, c, d, e, f, as listed above.

SAMPLE LETTER B

(To Be Sent to Inmate Within 8 Days of Receipt of Publication by Mailroom)

(DATE)

MEMORANDUM

TO: (Inmate Name and Number)

FROM: Warden/Superintendent

SUBJECT: Publication Disapproval

Your publication, list name and issue volume has been received. I have reviewed this publication and determined that it violates Division Operating Procedure 852, (Put section of procedure it violates). The violation of the procedure exists on page(s) (list page numbers). Therefore, based on this information, I am disapproving possession of this publication.

Your publication will be forwarded to the Publication Review Committee and you will be notified of their decision. At that time, if you are dissatisfied with their decision, you may appeal through the provisions established in Procedure 10-2, Inmate Grievance Procedure.

cc: Mail Room*

SAMPLE LETTER C

(To Be Sent to Inmate After Review by Publication Review Committee)

(DATE)

MEMORANDUM

TO: (Inmate Name)

FROM: Warden/Superintendent

SUBJECT: Publication Disapproval

Your publication, list name and issue volume has been reviewed by the Publication Review Committee. It has been determined that you cannot possess this publication.

This publication has been disapproved due to the violation of Division Operating Procedure 852, list section. If you are dissatisfied with this decision you may appeal

---

*(A copy of this letter will be attached to publication and forwarded to the Publication Review Committee)

through the provisions established in the Inmate Grievance Procedure – Procedure 10-2, within five (5) working days. Otherwise, in accordance with Division Operating Procedure 856, you must dispose of this property as established in Operating Procedure 856.

cc: Grievance Coordinator*
Personal Property
Mail Room

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*(If the grievance coordinator receives a grievance, then he must notify personal property/mailroom to retain publication pending review of grievance at all levels)

(2)

Supreme Court, U.S.
FILED
AUG 23 1996
CLERK

NO. 96-156

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

EDWARD MURRAY, in his official capacity as Director of the Virginia Department of Corrections (VDOC); JOHN DOE, 1-7, in their official capacities such fictitious names being designated to identify those VDOC employees whose true identities are now unknown to plaintiff-intervenor, but who serve as (a) members of the VDOC Publication Review Committee, (b) Warden or Superintendent of Keen Mountain Correctional Center (KMCC), and (c) functional KMCC mailroom censor,

Petitioners,

v.

MONTCALM PUBLISHING CORPORATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

Maryanne B. Orenstein
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Keith S. Orenstein
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635 Madison Avenue
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Attorneys for Respondent

4 pp

Question Presented

1. Whether Virginia Department of Corrections Operating Procedure 852 is unconstitutional because it fails to provide a publisher with notice that its publication has been disapproved for receipt by the subscribing inmate and with an opportunity to submit a brief written response thereto.

Statement of No Parent or Susidiary Companies

In compliance with Rule 29-.6 of the Rules of Court, respondent states that there are no parent companies or nonwholly owned subsidiary companies of Montcalm Publishing Corporation to be listed.

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Constitutional Provisions, Statutes and Rules

First Amendment ..... *passim*
Fourteenth Amendment ..... *passim*
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NO. 96-156

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

EDWARD MURRAY, in his official capacity as Director of the Virginia Department of Corrections (VDOC); JOHN DOE, 1-7, in their official capacities such fictitious names being designated to identify those VDOC employees whose true identities are now unknown to plaintiff-intervenor, but who serve as (a) members of the VDOC Publication Review Committee, (b) Warden or Superintendent of Keen Mountain Correctional Center (KMCC), and (c) functional KMCC mailroom censor,

Petitioners,

v.

MONTCALM PUBLISHING CORPORATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

Constitutional Provisions, Statutes and Rules Involved

This case involves the straightforward application of the Due Process clause of the Fourteenth Amendment to the United States Constitution to Virginia Department of Corrections Division Operating Procedure 852 (henceforth DOP 852), which does not

provide for notice to and an opportunity to be heard by a publisher whose publication has been disapproved for distribution to an inmate-subscriber.

Statement of the Case

A. Introduction

Virginia prison officials are authorized by regulation, promulgated by the VDOC pursuant to authority granted by Section 53.1 – 35 of the Code of Virginia, *see* DOP 852 § II, to deny inmates access to certain written publications to which they have specifically subscribed. That regulation provides in relevant part as follows:

> The Warden/Superintendent, or his designee, will disapprove a publication for receipt and possession by an inmate on grounds of obscenity if:
>
> 1. The publication depicts or describes sexual conduct in such a way to include, either:
>
> a. Representations or descriptions of actual sexual intercourse, normal or perverted, anal or oral; or,
>
> b. Representations or descriptions of excretion in the context of sexual activity or lewd exhibitions of uncovered genitals in the context of masturbation or other sexual activity; *and*
>
> 2. A reasonable person viewing

> the depiction or representation would find that the material taken as a whole appeals to a prurient interest in sex.

DOP 852 § VIII.D. (emphasis added). Section VII.A. provides that "[t]he Warden/Superintendent of each facility will approve or disapprove publications for receipt by inmates on a case-by-case and/or issue-by-issue basis."[1] (The full text of DOP 852 is set forth in the Petition for a Writ of Certiorari at Appendix H.)

Wholly absent from these regulations is any requirement that the publisher of magazines which are disapproved for receipt by the inmate-subscriber be provided with notice of and an opportunity to comment on the disapproval.

B. Factual Background

Montcalm is the publisher of *Gallery* magazine, a monthly publication which is sold at newsstands and by subscription in the Commonwealth of Virginia and elsewhere. Each issue of Gallery includes, inter alia, articles, fiction, commentary, photographic layouts of nude women, and paid advertisements. *Gallery* has received awards for literary and artistic merit, including the prestigious O'Henry Award for short fiction and the Print's Regional Design Annual

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[1] Notwithstanding the unambiguous text of DOP 852, petitioners persistently refuse to acknowledge either that the regulation calls for a two-part test to determine the propriety of permitting an inmate to receive the magazine(s) to which he has subscribed or that an issue-by-issue review of a monthly magazine is required.

Certificate of Design Excellence and has been cited as authority in the Congressional Record for a series of articles concerning various ethnic groups in the United States. *Gallery* has never been found to be obscene under the *Miller v. California* standard in any proceeding to which Montcalm has been a party.

Donald Hodges (Hodges) and Michael Flora (Flora), inmates at Keen Mountain Correctional Center (KMCC), one of many correctional facilities maintained by the VDOC, were *Gallery* magazine subscribers at the time Montcalm mailed their subscription copies of the June 1992 through September 1992 issues of *Gallery* to them at KMCC.

Hodges and Flora each commenced *pro se* civil rights actions after the VDOC informed them that they would not be permitted to receive their subscription copies of the June 1992 and September 1992 issues of *Gallery* because those issues allegedly violated DOP 852. They had, however, received *Gallery* through May 1992 and the July and August 1992 issues. The VDOC informed the inmates that these issues were being withheld from them because certain written passages in the magazines, not shown to either of them, described explicit sexual conduct in a manner inconsistent with the "obscenity criteria" of DOP 852. The sole expressed basis for the disapproval of the June 1992 and September 1992 issues of *Gallery* was the written and not the photographic content. Allegedly, up to June 1992, only the pictorial content had been reviewed by the prison officials. The July 1992 issue was never forwarded to the Publication Review Committee (PRC) of the VDOC and hence was

received by the inmate-subscriber. The August 1992 issue was reviewed again by the PRC at the request of the prison, but was approved for receipt by the inmate-subscriber. After the present suit was filed, the PRC examined the July 1992 issue and reexamined the August 1992 issue. The PRC now concluded that these issues violated DOP 852 and were consequently disapproved. Petitioners contend that these issues of *Gallery* were subject to a "better" review but they point to nothing in the record to support this assertion. *See* Petition at 24.

In the defendants' previously-denied summary judgment motions in these actions, the District Court (Kiser, Ch. J.) reviewed not only the withheld June 1992 and September 1992 *Gallery* issues, but also the July 1992 and August 1992 issues of *Gallery* which the inmates had been permitted to receive and which they submitted to the Court as part of their papers in opposition to the defendants' motions. The Court found that the content of the withheld issues was indistinguishable from the content of the permitted issues. Memorandum Opinion of Kiser, Chief Judge, at 5 n.2 [Opposition Brief:Appendix A].

On September 30, 1993, the District Court granted the motion of Montcalm to intervene permissively as a party plaintiff, and Montcalm's intervenor complaint was filed with the court. (Montcalm learned of these proceedings and of KMCC's decision to exclude certain issues of *Gallery* magazine completely fortuitously; inmate Flora wrote to Montcalm requesting a refund because KMCC had refused to permit him to receive the magazines under his subscription.

On December 13, 1993 a hearing was held before Magistrate-Judge Cynthia D. Kinser. Following the submission of post-hearing briefs, Magistrate-Judge Kinser issued a Report-Recommendation, entered May 5, 1994 (Petition:Appendix D at 31a–63a), determining that DOP 852 was procedurally defective on its face and as applied in that it failed to provide Montcalm, as a publisher, with notice of and an opportunity to be heard regarding the disapproval for distribution to the subscribing inmate of one of its publications, to wit, *Gallery* magazine. The Magistrate recommended that injunctive relief be granted requiring defendants to provide Montcalm with notice and an opportunity to be heard. The Magistrate, however, otherwise upheld the validity of the regulation, rejecting the facial and as applied challenges advanced by the plaintiffs, including plaintiff-intervenor Montcalm.

Thereafter, the District Court (Wilson, J.) issued a Memorandum Opinion and a Final Order dated and entered December 19, 1994. *Hodges v. Commonwealth of Virginia*, 871 F.Supp. 873 (W.D. Va. 1994) [Petition:Appendix B]. Briefly, the court agreed with the Magistrate that the regulation was substantively reasonable and valid. The court, however, disagreed with the Magistrate on the issue of notice, and determined that Montcalm was not, as a matter of procedural due process, entitled to notice and an opportunity to be heard separate and apart from that afforded the inmate. Judgment was granted in defendants' favor dismissing the plaintiffs' claims in their entirety. On appeal, the Fourth Circuit reversed, squarely holding that "publishers are entitled to notice and an opportunity to be heard when their publica-

tions are disapproved for receipt by inmate subscribers." *Montcalm Publishing Corporation v. Beck*, 80 F.3d 105, 106 (1996) [Petition:Appendix A]. The Fourth Circuit remanded the case to the District Court for "a determination of the appropriate process to be provided to publishers of rejected publications." *Id.* at 110. Petition for rehearing was denied.

Summary of the Argument

The Fourth Circuit correctly held that magazine publishers, such as respondent, are entitled to notice and an opportunity to be heard when their publications are disapproved by prison authorities for receipt by inmate-subscribers. The ruling by the court below involved application of well-settled law. Petitioner's contention, rejected without comment by the Fourth Circuit, that no Article III case or controversy is present regarding the question of notice and opportunity to be heard is meritless.

Accordingly, no reason exists for this Court to grant the petition for a writ of certiorari. The petition should be denied.

Reasons To Deny The Writ

A. The Fourth Circuit Correctly Held That Respondent Was Entitled To Notice And An Opportunity To Be Heard When Its Publications Are Disapproved For Receipt By Its Inmate-Subscribers

This Court has unequivocally recognized a First Amendment interest in those who wish to communicate with prison inmates. As was true in *Thornburgh v. Abbott*, 490 U.S. 401 (1989), so it is true in the present case: there can be "no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners." *Id.* at 408; *see also Procunier v. Martinez*, 416 U.S. 396 (1974). Although the *Martinez* Court expressly reserved the question of how that interest operates with regard to "mass mailings," *see id.* at 408 n.11, as the Fourth Circuit observed, mass mailings are not involved in this case. Rather, this case concerns solely the receipt of a publication to which an inmate has specifically subscribed and to whom a publisher specifically mails that publication. The issue resolved handily in respondent's favor by the Fourth Circuit was simply whether a publisher who has a First Amendment right to communicate with an inmate-subscriber is entitled to some form of notice and an opportunity to be heard when its publication is disapproved for receipt by the inmate-subscriber. In deciding this issue in respondent's favor, the Fourth Circuit unequivocally rejected the wholly unsupported argument that respondent was not entitled to even

minimal due process protections because its magazine "graphically depict[s] sexual acts of intercourse in every issue without exception". Petition at 17. Petitioners' argument is also contradicted by the requirement of the regulation (DOP 852) that petitioners are charged to uphold, to wit, that publications intended for receipt by inmates be reviewed on a case-by-case and/or issue-by issue basis. *See* DOP 852(VII)(A). Apparently, petitioners believe that they can pick and choose which portions of DOP 852 they will observe and those which they will not.

Petitioners' sensational resort to the line of cases concerned with children and the regulation and prohibition of sexually-oriented materials is alarming inasmuch as these cases are wholly inapposite, having nothing to do with the issue at hand. Petitioners devote an inordinate amount of space in their petition (*see* Petition at 11-17) instructing the Court on various definitions of "obscenity", quoting a letter from the "Feedback" section of *Gallery* (*see id.* at 13 n.2) and relating the alleged detrimental impact that such material has on prison security and rehabilitation efforts (*see id.*). In so doing, petitioners have studiously avoided confronting the very simple issue resolved adversely to them by the Fourth Circuit, to wit, whether magazine publishers, like respondent, who have a First Amendment right as regards communicating with inmate-subscribers, are entitled to notice and an opportunity to be heard when that First Amendment right has been denied.

Petitioners' contention that the Fourth Circuit "declined to follow this Court's decision in *Jones v.*

North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 130-31 (1977), characterizing this Court's First Amendment rule in *Jones* with respect to prison bulk mailings as 'barely implicated' in this case", Petition at 5, represents a gross misrepresentation of the Fourth Circuit's opinion. With respect to *Jones*, the Fourth Circuit stated as follows:

> *Jones* does not control the outcome of this case for two reasons. First, this case does not concern bulk mailings, but rather the sending of publications to those who have specifically subscribed to them. Second, the *Jones* Court simply held that the prisoners' loss of the ability to save money by using bulk mail did not implicate the First Amendment.

80 F.3d at 109 [Petition:Appendix A at 10a]. The Fourth Circuit correctly distinguished *Jones* from the facts and circumstances of the present case.

Additionally, all the courts below uniformly recognized that respondent did indeed have a First Amendment interest in communicating with its inmate-subscribers.[2] Strangely, the district court, engaging in

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[2] As Magistrate-Judge Kinser recognized implicitly and District Judge Wilson stated expressly, "[p]ublishers, indeed, have a First Amendment interest in communicating with prisoners who seek their point of view through subscriptions." *Hodges v. Commonwealth of Virginia*, 871 F.Supp. at 878 (citing *Thornburgh v. Abbott*, 490 U.S. 401, 408, 109 S.Ct. 1874, 1878-1879 (1989)) [Petition:Appendix B at 23a]; *see also* Report and Recommendation at 23, 25 [Petition:Appendix D at 54a., 55a]. The Fourth Circuit also underscored respondent's First Amendment

a misconstruction and misapplication of *Mathews v. Eldridge*, 424 U.S. 319 (1976), determined that respondent's and other similarly-situated publishers' First Amendment interests were adequately protected by the notice given to the inmate-subscriber, and, hence, separate notice to the publishers was not needed. *Hodges v. Commonwealth*, 871 F.Supp. at 878-880 [Petition:Appendix B at 24a-27a]. The Fourth Circuit rightly reversed the district court's decision, reasoning that "[a]n inmate who cannot even see the publication can hardly mount an effective challenge to the decision to withhold that publication". *Montcalm Publishing Corporation v. Beck*, 80 F.3d at 109 [Petition:Appendix at 11a]. Protection of a publisher's First Amendment right cannot depend upon the publisher's fortuitous receipt of the letter that was sent to the inmate, *see id.*, as was the case here.

Respondent is entitled, as a matter of procedural due process, to some form of notice and opportuni-

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interest stating, "[h]aving recognized that Montcalm indeed has a constitutional interest in communicating with its inmate-subscribers, we cannot conclude that it is entitled to no process at all when VDOC prevents the subscribers from receiving Montcalm's publications." *Montcalm Publishing Corporation v. Beck*, 80 F.3d at 109 [Petition:Appendix A at 11a].

That being the case, whether, as petitioners have argued throughout these proceedings, *Cofone v. Manson*, 409 F.Supp. 1033 (D. Conn. 1976), is questionable precedent is wholly beside the point.

It must be pointed out that petitioners did not argue in its objections to the Magistrate-Judge's Report and Recommendation that respondent did not have such a First Amendment right or that this right was not being deprived. *See* Defendants' Objections to the Magistrate Judge's Report and Recommendation [Opposition Brief:Appendix B].

ty to be heard when the State, as a consequence of the prison facility's issue-by-issue review of its monthly magazine *Gallery*, denies a subscribing inmate receipt of that publication. If a protected interest, be it a "property" interest or a "liberty" interest, has been or is about to be deprived, then notice and an opportunity to be heard must have been or must be afforded in some fashion. That much is settled law. *See, e.g., Leis v. Flynt*, 439 U.S. 438, 99 S.Ct. 698 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893 (1976); *Blount v. Rizzi*, 400 U.S. 410, 91 S.Ct. 423 (1971); *Richardson v. Town of Eastover*, 922 F.2d 1152, 1160 (4th Cir. 1991); *Propert v. District of Columbia*, 948 F.2d 1327, 1332 (D.C. Cir. 1991) ("Nevertheless, however weighty the governmental interest may be in a given case, the amount of process required can never be reduced to zero — that is, the government is never relieved of its duty to provide some notice and some opportunity to be heard prior to final deprivation of a property interest.") (emphasis in original); *Berg v. Commander, Fifth Coast Guard District*, 810 F.Supp. 703, 709 (E.D.Va. 1992) (noting that it is settled law that procedural due process must accompany a deprivation of a constitutionally-protected liberty or property interest), *aff'd*, 27 F.3d 562 (4th Cir. 1994); *Bosley v. Baltimore County, Maryland*, 804 F.Supp. 744, 749 (D. Md. 1992), *aff'd*, 986 F.2d 1412 (4th Cir. 1993). Petitioner errs in arguing to this Court, and the district court below erred in concluding, that, under *Mathews v. Eldridge, supra*, due process is a flexible enough concept to allow for no process at all. This construction and application of *Mathews* is wholly without any legal basis. Entirely correctly, the Fourth

Circuit did not cite to (except insofar as it set forth the reasoning of the District Court), much less discuss, *Mathews*, no doubt because the issues raised in *Mathews* are demonstrably different from those raised in this case.[3]

Petitioners contend that affording respondent procedural due process protections "creates a heretofore unrecognized basis for federal judicial supervision of state prisons" and that it "wrongly increases the expense and burdens of prison administration." Petition at 18. Petitioners fail to explain how affording respondent minimal Due Process protections constitutes "federal judicial supervision of state prison" and its claim that prison administration expense and burdens would increase falls far short of the "unduly burdensome" requirement of *Martinez*. *See Martinez*, 416 U.S. at 419.[4] As the Fourth Circuit observed, "[a]t present, VDOC procedures require written notice to inmates when a publication is

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[3] The issue in *Mathews* was "whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing." *Mathews*, 424 U.S. at 323. Not at issue in *Mathews* was whether the recipient need be notified of benefits termination or whether the recipient need be afforded any opportunity to be heard regarding benefits termination.

[4] Petitioners' citation to *Lawson v. Dugger*, 840 F.2d 781 (11th Cir. 1987), *vacated*, 490 U.S. 1078 (1989), *on remand*, 897 F.2d 536 (11th Cir. 1990), *on remand*, 844 F.Supp. 1538 (S.D. Fla. 1994), and notation that Florida adopted review procedures substantially similar to the regulations at issue in *Abbott*, undercuts their argument regarding the expense and burdens of affording publishers notice of and an opportunity to be heard on the exclusion of one of its publications.

disapproved." 80 F.3d at 109 [Petition:Appendix A at 11a]. That being the case, "providing a copy of this notice to publishers of disapproved publications and allowing the publishers to respond in writing would pose a minimal burden on corrections officials." *Id.*

DOP 852 does not provide for any notice to or opportunity to be heard by publishers, like Montcalm, whose magazines are denied to their inmate-subscribers. DOP 852 is, therefore, unconstitutional on its face for failing to provide to such publishers even the most minimal protections of the Due Process clause. That inmates and those on the outside wishing to communicate with them must suffer a curtailment of constitutional rights does not afford a basis for prison administrators to completely deny a non-inmate correspondent even the most minimal protections of the Due Process clause. Given the Fourth Circuit's unremarkable application of settled law in respondent's favor, no reason exists for this Court to grant the petition for a writ of certiorari.

B. The Fourth Circuit Did Not Err In Rejecting Without Comment Petitioner's Argument That Respondent Lacks Standing To Seek Declaratory Relief And That No Article III Case Or Controversy Exists

Petitioners argue that "[o]nce a final judicial determination had been made that the VDOC effectively, and correctly, banned *Gallery* from Virginia's prisons – an issue that became final when the inmates and Montcalm failed to appeal the district court's

judgment on that issue – no case or controversy existed any longer." Petition at 25. Petitioners' argument that no live case or controversy is present and that respondent lacks standing to pusue declaratory and injunctive relief is meritless. The court below rightly rejected this argument without comment, both in reversing the decision of the district court and in denying petitioner's petition for rehearing.

In so arguing in their petition, petitioners misrepresent the determination of the district court regarding the substantive issue as to the propriety of the prison's disapproval of specific issues of *Gallery*. The district court, in adopting the recommendations of the magistrate, ruled that petitioners had not unconstitutionally disapproved for distribution to the subscribing inmates specific issues of *Gallery*. Neither the magistrate nor the district court was called upon to pass judgment on any absolute ban on any and all issues of *Gallery*. Moreover, the district court did not dispute or disagree with the magistrate's determination that monthly reviews of *Gallery* was required by DOP 852; rather, the district court disagreed that separate notice of any disapproval as a result of that monthly review needed to be provided to respondent.

An Article III case or controversy exists between the State and respondent permitting and warranting declaratory and injunctive relief in respondent's favor because each time respondent's publication *Gallery* is not permitted to be delivered to the subscribing inmate, respondent's First Amendment right to communicate to that subscriber is adversely affected. Each time respondent fails to

receive notice of that denial and thus is not afforded an opportunity to comment on the denial, respondent is deprived of the process due it under the Fourteenth Amendment, as has been set forth above at length. The opportunity to comment upon the denial is crucial for it is here that respondent, unlike the inmate-subscriber who will not know what the "offending" passages consist of or in what context they were presented, can attempt to persuade the prison officials charged with applying DOP 852 that a "reasonable person viewing the depiction or representation [in the particular month's issue involved] would find that the material taken as a whole [does not] appeal[] to a prurient interest in sex." DOP 852 (VIII)(D)(2).[5] The injury respondent suffers could not be more real and immediate, *see City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983), and well-established law holds that violations of constitutional rights are generally recognized to be irreparable and sufficient to

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[5] It must be borne in mind that the regulation sets forth a two-part test, the first part of which focuses on whether certain conduct is represented or described in the publication, and the second part of which requires that the "offending" matter be placed in the context of the publication as a whole so that a determination can be made whether the publication as a whole would appeal to a prurient interest in sex from the point of view of a reasonable person.

Based upon the text of the regulation, then, *Gallery* cannot be rejected for dissemination to the inmate-subscriber solely on the ground that it contains written passages that describe certain conduct. Satisfying the first part of the test is insufficient, and satisfying the first part of the test does not mean that the second part is automatically satisfied without any further inquiry of deliberation on the part of the prison officials charged with applying the regulation. Hence, input from respondent should not be viewed as a futile act, and notice to respondent cannot be viewed as pointless.

justify injunctive relief. *Ross v. Meese*, 818 F.2d 1132, 1134-1135 (4th Cir. 1987) (noting that the denial of a constitutional right constitutes irreparable harm for the purposes of equitable jurisdiction); *Scelsa v. City University of New York*, 806 F.Supp. 1126 (S.D.N.Y. 1992); *Multimedia Publishing Company of South Carolina, Inc. v. Greenville-Spartanburgh Airport Dist.*, 774 F.Supp. 977, 986 (D.S.C. 1991) (denial of First Amendment right to distribute newspapers in a public forum constitutes irreparable injury thus entitling plaintiff to injunctive relief), *aff'd in part and vacated and remanded in part*, 991 F.2d 154 (4th Cir. 1992); *United States for the Use of Pensacola Construction Co. v. St. Paul Fire and Marine Insurance Co.*, 705 F.Supp. 306, 310 (W.D. La. 1989) ("The loss of procedural rights . . . is the kind of damage protected by the Declaratory Judgment Act."); *United States v. State of Michigan*, 508 F.Supp. 480, 492 (W.D. Mich. 1980) ("Where the denial of fundamental interests such as constitutional rights are involved, damage is presumed to be irreparable and an injunction should issue as a matter of course."), *aff'd*, 712 F.2d 242 (6th Cir. 1983).

The presence of adverse legal interests between parties, such as exists between respondent Montcalm and petitioners, supplies the requisite case or controversy within the meaning of Article III and the Federal Declaratory Judgment Act. *White v. National Union Fire Insurance Company of Pittsburgh, Pa.*, 913 F.2d 165, 167 (4th Cir. 1990).

Petitioners have adopted the position that they will continue to disapprove *Gallery* for distribution to

inmate-subscribers based upon past disapprovals, notwithstanding DOP 852 which requires issue by issue, month by month review and that they will not give notice of such disapprovals or afford Montcalm an opportunity to comment upon the disapprovals. Accordingly, there exists a sufficient likelihood that Montcalm will be wronged again in the future. *See City of Los Angeles v. Lyons*, 461 U.S. at 105, 111.

As they essentially argue now, albeit within the framework of Article III jurisprudence (*see* Petition at 26-27), so they argued before the magistrate, to wit, that Montcalm knows "that *Gallery* will not be approved for future dissemination until its material is 'toned down'"; hence, declaratory and injunctive relief is unnecessary and would serve no real purpose. Report and Recommendation at 26 [Petition:Appendix at 56a]. The magistrate deftly rejected these arguments stating,

> In response to these contentions, the court need only turn to the review process itself, which belies the Commonwealth's position. The PRC conducts monthly evaluations of publications to which the individual institutions have objected. The PRC then determines whether that monthly issue violates DOP 852. It makes no judgment about future issues. Indeed, DOP 852 VII.A. states that "each facility will approve or disapprove publications for receipt by inmates on a *case-by-case* and/or *issue-by-issue* basis . . ."].

Report and Recommenation at 26 (emphasis supplied) [Petition:Appendix D at 56a-57a]. As Magistrate-Judge Kinser trenchantly observed, "[t]he review process itself which requires each issue of a publication to be evaluated makes declaratory and injunctive relief appropriate to Montcalm under these circumstances." Report and Recommendation at 31 [Petition:Appendix D at 62a]. Tellingly, petitioners did not file any objection to this portion of the Magistrate-Judge's Report and Recommendation. *See* Defendants' Objections [Opposition Brief:Appendix B].

No issue under Article III is raised warranting further review by this Court.

Conclusion

For the reasons set forth above, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A—MEMORANDUM OPINION AND ORDER OF CHIEF JUDGE JACKSON L. KISER

CLERK'S OFFICE U.S. DIST. COURT
AT ROANOKE, VA.
FILED JUNE 16 1993
JOYCE F. WITT, Clerk
Deputy Clerk/stamp

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

DONALD A. HODGES,

Plaintiff,

v.

COMMONWEALTH OF VIRGINIA. et al.,

Defendants.

Civil Action No. 92-0696-R
Memorandum Opinion

By: Jackson L. Kiser, Chief Judge
United States District Court

Plaintiff Donald Hodges, an inmate at Keen Mountain Correctional Center [hereinafter "KMCC"], has filed this *pro se* civil action pursuant to 42 U.S.C. §1983, with jurisdiction vested pursuant to 28 U.S.C. §1343. Plaintiff claims that the defendants have violated his constitutional rights by refusing to permit him to receive two issues of *Gallery Magazine*. He

names as defendants several officials and employees with the Virginia Department of Corrections [hereinafter "VDOC"] and seeks monetary damages. The defendants, through counsel, filed a motion to dismiss and plaintiff has responded. This action therefore is ripe for consideration.

Upon motion for summary judgment, the court must view the facts and the inferences to be drawn from those facts, in the light most favorable to the party opposing the motion. *Ross v. Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985). Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). However, [t]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242. (1986).

When a motion for summary judgment is made and properly supported by affidavits, depositions, or answers to interrogatories, the adverse party may not rest on the mere allegations or denials of the adverse party's pleadings. Instead, the adverse party must respond by affidavits or otherwise and present specific facts showing that there is a genuine issue of disputed fact for trial. Fed. R. Civ. P. 56(e). If the adverse party fails to show a genuine issue of fact, summary judgment, if appropriate, may be entered against the adverse party.

Plaintiff alleges in his complaint and supporting documents that he has a subscription to *Gallery Magazine* and that while he has been permitted to receive some of the issues, he was not permitted to receive the June or September 1992 issues after the defendants determined that certain articles in those issues violated Division Operating Procedure ["DOP"] 852.

Plaintiff not only challenges the constitutionality of DOP 852, but also asserts that the policy is not applied consistently within the VDOC and KMCC.

It is well-settled that prison officials can regulate a prisoner's access to incoming publications as long as the regulations are reasonably related to legitimate penological interests. *Thornburgh v. Abbott,* 490 U.S. 401, 413 (1989). In determining whether a regulation satisfies the reasonableness standard, a court must consider the four factors announced in *Turner v. Safely,* 482 U.S. 78, 89-91 (1987). A court assessing a regulation's reasonableness under *Turner* must consider: 1) whether a legitimate governmental objective is involved and whether there is a rational connection between that objective and the regulation; 2) whether the inmate has other means of exercising the constitutional right in question; 3) whether accommodation of the right would have a ripple effect within the institution; and 4) whether there is an absence of ready alternatives for the institution to accommodate the inmate's rights. *Id.*

The defendants argue in their motion for summary judgment that DOP 852 satisfies the *Turner* reasonableness standard. DOP 852 permits inmates to receive subscription magazines directly from the publishers as long as the publications "are not obscene, and do not pose a threat to the security, discipline, and good order of the institution." Under the regulation, publications are reviewed on an issue-by-issue basis at the local level to determine whether they come within the terms of the guideline. Once a determination is made at the local level that a publication violates DOP 852, the publication is sent to the VDOC Publication Review Committee. If the Review Committee concurs in the findings at the local level, the publication is returned to the institution, which notifies the

inmate of its disapproval and presents him with the option of having the issue destroyed or sent home.

In the instant case, plaintiff's two issues of *Gallery* were disapproved for receipt into KMCC because articles in those issues violated the obscenity provisions of DOP 852.[1] The Review Committee concurred in the decision, and plaintiff was notified of the disapproval and given the opportunity to direct the disposal of the issues.

While the defendants have addressed the reasonableness of DOP 852 under the *Turner* standard, their motion is silent as to plaintiff's claim that the regulation has been applied arbitrarily and inconsistently within KMCC. In the supporting documents filed with his complaint plaintiff claims that the KMCC library contains books with explicit sexual descriptions which also violate DOP 852, Plaintiff also alleges that some inmates at KMCC were permitted to receive the June 1992 issue of *Gallery* which he and other inmates were denied. In addition, plaintiff has submitted a copy of the August 1992 issue of *Gallery* presumably to demonstrate that the articles in this issue received approval under DOP 852 despite the fact

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[1] DOP 852 provides that a publication may be disapproved as obscene if it:

(1) depicts or describes sexual conduct in such a way to include, either:
a) representations or descriptions or actual sexual intercourse, normal or perverted, anal or oral; or,
b) representations or descriptions of excretion in the context of sexual activity or lewd exhibitions of uncovered genitals in the context of masturbation or other sexual activity ; and,
(2) a reasonable person viewing the depiction or representation would find that the material taken as a whole appeals to a prurient interest in sex.

that they contain the same types of depictions which caused the June and August [sic] issues to be disapproved.[2]

Because the defendants have not addressed plaintiff's claim concerning the allegedly inconsistent application of DOP 852, I must deny the defendants' motion for summary judgment. Inasmuch as an evidentiary hearing will be held as to this claim, I deem it prudent to save the larger question of the constitutionality of DOP 852 for further development at the evidentiary hearing.

Inasmuch as this matter originally arose in the Abingdon Division of this court, the case will be transferred to the Honorable Samuel G. Wilson to conduct any further proceedings in this matter.

The Clerk of the Court is directed to send certified copies of this Memorandum Opinion and accompanying Order to plaintiff and to counsel of record for the defendants.

ENTER: This 16th day of June, 1993.

Jackson L. Kiser/signature

CHIEF U.S. DISTRICT JUDGE

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[2] I have compared the articles in this issue with the challenged articles in the June and September issues and can find no difference whatsoever between the two sets of articles in terms of the obscenity criteria laid out in DOP 852.

CLERK'S OFFICE U.S. DIST. COURT
AT ROANOKE, VA.
FILED JUNE 16 1993
JOYCE F. WITT, Clerk
Deputy Clerk/stamp

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

DONALD A. HODGES,

Plaintiff,

v.

COMMONWEALTH OF VIRGINIA. et al.,

Defendants.

Civil Action No. 92-0696-R

ORDER

By: Jackson L. Kiser, Chief Judge
United States District Court

In accordance with the written Memorandum Opinion entered this day, it is hereby ADJUDGED and ORDERED that the defendants' Motion for Summary Judgment is DENIED.

The Clerk of the Court is directed to send certified copies of this Order and accompanying Memorandum Opinion to plaintiff and to counsel of record for the defendants.

ENTER: This 16th day of June, 1993.

Jackson L. Kiser/signature
CHIEF U.S. DISTRICT JUDGE

APPENDIX B—DEFENDANTS' OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

DONALD A. HODGES, et al.,

Plaintiffs,

v.

COMMONWEALTH, et al.,

Defendants;

and

MICHAEL G. FLORA, et al ,

Plaintiffs,

v.

COMMONWEALTH, et al.,

Defendants.

DEFENDANTS' OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

CIVIL ACTION NO. 92-0696
CIVIL ACTION NO. 92-3907

Defendant officials of the Virginia Department of Corrections (VDOC), by counsel, respectfully object to that portion of the Recommendation of the Magistrate Judge which requires the VDOC to provide notice to Montcalm Publishing Corporation (Montcalm) whenever an issue of *Gallery* magazine is denied for receipt into a VDOC prison. Specifically, defendants object to Recommended Finding of Fact No. 13 and Recommended Conclusions of Law Nos. 25-28. Defendants submit that they are not required to give notice to a purveyor of a pornographic magazine when its magazine has been disapproved for receipt into a state prison. Alternatively, defendants request the Court to exercise its discretion and decline to grant an injunction or declaratory relief to Montcalm, inasmuch as any judgment in Montcalm's favor would have no practical effect.

I.

PRISON AUTHORITIES ARE NOT REQUIRED TO GIVE NOTICE TO SENDERS OF MASS PORNOGRAPHIC MAILINGS THAT THEIR MAILINGS HAVE BEEN DENIED FOR RECEIPT INTO STATE PRISONS

In *Procunier v. Martinez*, 416 U.S. 396 (1974), the Supreme Court determined, among other things, that the author of a personal letter written to an inmate is entitled to notice if his letter is rejected for receipt into the prison. 416 U S. at 417-419. The *Martinez* decision, however, clearly is limited to correspondence in the nature of personal letters. The Court explicitly reserved judgment as to whether mass mailings were entitled to the same institutional protections as individual correspondence 416 U.S. at 408 n. 11. The Court has not revisited this issue since that time.

In *Thornburgh v. Abbott,* 490 U.S. 401 (1989), the Court observed that publishers wishing to communicate with inmates who "willingly seek their point of view have a legitimate First Amendment interest in access to prisoners." 403 U.S. at 407. The Court did not, however, address the notice issue since the Bureau of prisons' regulations challenged in *Abbott* provided for notice to publishers in the event that a publication was disapproved for receipt. Apart from the "mass mailings" issue that the *Martinez* Court reserved, the Supreme Court has never squarely addressed the subject of notice when the mass mailing consists of pornographic material.

Neither the Fourth Circuit or [sic] any district circuit within this circuit has written about the subject of publisher notice. Notwithstanding the discussion of several cases on p. 24 of the Magistrate Judge's Report and Recommendation, the *only* decision that explicitly extends a notice requirement to publishers is the decision in *Cofone v. Manson,* 409 F.Supp. 1033 (D.Conn 1976). Even that single case appears to have been wrongly decided, inasmuch as the only plaintiff in the proceeding was an inmate whose standing to raise the issue of publisher notice is questionable. Thus this Court confronts a novel issue of constitutional law when it determines whether publishers of mass mailings, or publishers of pornographic materials, are entitled to notice when prison authorities reject a magazine for receipt into a prison facility.[1]

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[1] Although the issue of notice to publishers is unresolved, the question presented is one purely of law and can be resolved without resort to a review of the trial proceedings.

The clear rationale behind both the *Martinez* and *Abbott* decisions is the unassailable notion that the communication of ideas ordinarily should flow freely, and that when there is adequate justification to restrict that flow of information, such as in a prison context, then both the sender and intended recipient should have notice and an opportunity to contest the decision. Yet, the Court has clearly recognized that mass mailings may present a particular problem in the prison context; accordingly, different considerations may apply than would be applicable in the case of an individual sender. *See Martinez* n. 11. Such considerations become even more problematic when the mass mailing contains pornographic, or even obscene, material.

The letters contained in the "Feedback" section of *Gallery* are devoid of any ideas that have an entitlement to constitutional protection. The letters themselves are clearly obscene and, viewed apart from the rest of the magazine, would be entitled to no First Amendment protection in free society. *See Paris Adult Theatre I v. Slayton*, 413 U.S. 49 (1973). Clearly prison authorities can isolate their attention upon specific portions of a magazine in deciding whether the publication may be allowed into a prison. *Thornburgh v Abbott,* 490 U.S. at 418-19 (discussing Bureau of Prisons "all-or-nothing" rule). Montcalm is charged with recognizing that the contents of its "Feedback" section in each *Gallery* issue contains legally obscene materials. Montcalm is further charged with knowledge of the fact that prison authorities may focus their attention on these obscene letters in determining whether the magazine is suitable for admission into a prison. Since the letters are not entitled to constitutional protection, in a prison setting, there accordingly should be no requirement that the sender of these materials receive notice when the magazine containing the letters is disapproved for receipt.

II.

THIS COURT SHOULD EXERCISE ITS DISCRETION AND REFUSE TO ISSUE EITHER AN INJUNCTION OR DECLARATORY RELIEF

Assuming *arguendo* that Montcalm has some entitlement to notice when a decision is reached to disapprove *Gallery* for receipt into Virginia's prisons, this Court should nonetheless exercise the discretion available to it to decline to issue either injunctive or declaratory relief. The legal authorities that support the conclusion that this Court may exercise discretion in this regard are discussed at pp. 19 and 20 of the Defendants' Post-Trial Memorandum Of Law and will not be repeated herein. The Magistrate Judge recommends that the Court reject the defendants' argument in this regard because the VDOC regulation requires a review of every issue of a magazine, notwithstanding the fact that the ultimate decision is, for all practical purposes, preordained.

The reality is that *Gallery* had been consistently disapproved for receipt for well over a year at the time that this case was heard. The content of the "Feedback" section has always been replete with obscene letters, and Montcalm has not given any indication that it might alter the magazine's format in order to make it acceptable for receipt into Virginia's prisons. Thus there is no practical effect of a notice requirement for Montcalm. A requirement that the VDOC give Montcalm notice that each and every issue of *Gallery* continues to be unacceptable is meaningless. Since the question of notice to other publishers is not presently before the Court, these defendants respectfully ask the Court to

exercise its discretion and decline to issue either an injunction or a declaratory judgment in Montcalm's favor with respect to the notice issue.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA, et al ,
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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 1994, a true copy of the foregoing Defendants' Objections To The Magistrate Judge's Report And Recommendation was mailed, postage prepaid, to Keith S. Orenstein, Counsel for Montcalm Publishing Corporation, 635 Madison Avenue, New York, New York, 10022; to Daniel R. Bieger, Local Counsel for Montcalm Publishing Corporation, 212 West Valley Street, P.O. Box 1296, Abingdon, Virginia, 24210; to Donald A.

Hodges, #144652, Keen Mountain Correctional Center, P O Box 710, Keen Mountain, Virginia, 26424; and to Michael G. Flora, #190234, Keen Mountain Correctional Center, 2 0. Box 710, Keen Mountain Virginia, 25424.

Mark R. Davis/signature
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Assistant Attorney General